Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

JANICE BOWERS WOLK,
Petitioner,

v.

UNUM LIFE INSURANCE
OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The Third Circuit in this case held that a partner/employer who obtained an individual disability insurance policy related to a group policy that covers employees must pursue remedies for wrongful denial of policy benefits under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., and not under state law. The Third Circuit reasoned that ERISA applied because the partner/employer is a "beneficiary," as defined in 29 U.S.C. § 1002(8), of an "employee welfare benefit plan," as defined in 29 U.S.C. § 1002(1), maintained for "participants and their beneficiaries," as set forth in 29 U.S.C. § 1002(1). There is an irreconcilable conflict in the circuit courts on this issue: Six Circuits (the First, Fourth, Fifth, Sixth, Seventh and Tenth Circuits) have held that employers wrongfully deprived of employment benefits are not subject to ERISA and therefore must proceed under state law, and four Circuits (the Third, Eight, Ninth and Eleventh Circuits) have reached a contrary conclusion. The question presented is whether an employer wrongfully deprived of self-acquired employment benefits is subject to ERISA, 29 U.S.C. § 1132(a), and is therefore precluded from seeking traditional state law remedies.

2. Whether application of ERISA, 29 U.S.C. § 1001 et seq., to an employer wrongfully deprived of self-acquired employment benefits preempts traditional state law remedies in contravention of constitutional principles of federalism because ERISA does not unambiguously require such a preemption and because such a preemption conflicts with the legislative purpose of ERISA as expressed in 29 U.S.C. § 1001.

PARTIES TO THE PROCEEDING

Petitioner

Janice Bowers Wolk, an individual. The petitioner is not a corporation.

Respondent

UNUM Life Insurance Company of America

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 6

A. Background 6
1. The Parties 6
2. Mrs. Wolk's Disability 8
3. UNUM's Handling of Mrs. Wolk's Disability Benefits 8

B. Procedural History 10
1. Proceedings in the United States District Court for the Western District of Pennsylvania 10
2. Appeal to the United States Court of Appeals for the Third Circuit 11
3. The Decision of the Third Circuit 11
4. Petition for Rehearing 12

REASONS FOR GRANTING THE WRIT 12

A. An Employer Wrongfully Deprived of Employment Benefits is not Subject to ERISA, 29 U.S.C. § 1132(a), and Can Therefore Pursue Traditional State Law Remedies 14

1. The First, Fourth, Fifth, Six, Seventh and Tenth Circuits have held that an employer is not subject to ERISA and therefore can only pursue traditional state law remedies 15

2. The Eighth, Ninth and Eleventh Circuits, as well as the Third Circuit in this case, have held that an employer deprived of self- acquired employment benefits is subject to ERISA, and is therefore precluded from pursuing traditional state law remedies 18

3. Inclusion of employers in an "employee welfare benefit plan," as defined in 29 U.S.C. § 1002(1), creates a conflict among 29 U.S.C. §§ 1002(1), 1002(7) and 1002(8) of ERISA 19

a. An employer cannot be a "participant," as defined in 29 U.S.C. s 1002(7), in an "employee welfare benefits plan," within the meaning of 29 U.S.C. § 1002(1) 19

b. The broad definition that the Eighth, Ninth and Eleventh Circuits, as well as the Third Circuit in this case, ascribe to the term "beneficiary" renders the term "participant" moot. 20

4. A logical reading of ERISA demonstrates that a "beneficiary" is a person who is designated by a participant" or, in the event the participant fails to make a designation, who is designated by default under the terms of the "employee welfare benefit plan" such that an employer is not a "beneficiary." . 22

5. The legislative purpose of ERISA, as express in 29 U.S.C. § 1001, is to protect employee benefits 23

B. Application of ERISA, 29 U.S.C. § 1001 et seq., to an Employer Wrongfully Deprived of Self-Acquired Employment Benefits Preempts Traditional State Law Remedies in Contravention of Constitutional Principles of Federalism because ERISA Does Not Unambiguously Require such a Preemption and because such a Preemption Conflicts with the Legislative Purpose of ERISA as Expressed in 29 U.S.C. § 1001 24

CONCLUSION 27

APPENDIX

Appendix A
Opinion of the United States Court of Appeals for the Third Circuit, dated June 30, 1999 . . . . 1a

Appendix B
Judgment of the United States Court of Appeals for the Third Circuit, dated June 30, 1999 . . . . . 14a

Appendix C
Memorandum Order of the United States District Court for the Western District of Pennsylvania, dated June 24, 1998 . . . . . 16a

Appendix D
Memorandum Opinion of the United States District Court for the Western District of Pennsylvania, dated April 2, 1998 . . . . . 26a

Appendix E
Sur Petition for Rehearing filed in the United States Court of Appeals for the Third Circuit, dated July 29, 1999 . . . . . 40a

TABLE OF AUTHORITIES

CASES

Blair v. Berkshire Life Ins. Co.,
429 F.2d 996 (3d Cir. 1970) 25, 26

California v. ARC Am. Corp.,
490 U.S. 93 (1989) 24, 25

Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,
447 U.S. 102 (1980) 19

Cury v. Colonial Life Ins. Co.,
737 F. Supp. 847 (E.D. Pa. 1990) 25

De Buono v. NYSA-ILA Medical and Clinical Services,
520 U.S. 806 (1997) 25

Eichhorn, Eichhorn & Link v. Travelers Ins. Co.,
896 F. Supp. 812 (N.D. Ind. 1995) 16

Engelhardt v. Paul Revere Life Ins. Co.,
139 F.3d 1346 (11th Cir. 1998) 18

Fugarino v. Hartford Life & Accident Insurance Company,
969 F.2d 178 (6th Cir. 1996) 16

Giardono v. Jones,
867 F.2d 409 (7th Cir. 1989) 15

Harris v. TMG Life Ins. Co.,
915 F. Supp. 869 (S.D. Tex. 1996) 17

Hull v. Rose, Schmidt, Hasley & DiSalle P.C.,
700 A.2d 996 (Pa. Super. Ct. 1997) 17

Idahoan Fresh v. Advantage Produce, Inc.,
157 F.3d 197 (3d Cir. 1998) 19

Kaiser Aluminum & Chemical Corp. v. Bonjorno,
494 U.S. 827 (1990) 19

Kwatcher v. Massachusetts Service Employees Pension Fund,
879 F.2d 957 (1st Cir. 1989) 16

Madden v. Country Life Ins. Co.,
835 F. Supp. 1081 (N.D. Ill. 1993) 16

Madonia v. Blue Cross and Blue Shield of Virginia,
11 F.3d 444 (4th Cir. 1993) 17

Matinchek v. John Alden Life Insurance Company,
93 F.3d 96 (3d Cir. 1996) 23

Nationwide Mut. Ins. Co. v. Darden,
112 S.Ct. 1344 (1992) 11, 17, 21, 26

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,
514 U.S. 645 (1995) 25

Northeast Dept. ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund,
764 F.2d 147 (3d Cir. 1985) 24

Peckham v. Board of Trustees,
653 F.2d 424 (10th Cir. 1981) 16

Peterson v. Am. Life & Health Ins. Co.,
48 F.3d 404 (9th Cir. 1995) 18, 21

Prudential Ins. Co. of Am. v. Doe,
76 F.3d 206 (8th Cir. 1996) 18, 21

Spurlock v. Employers Health Ins. Co.,
13 F. Supp. 2d 884 (E.D. Wis. 1998) 16

Vega v. Nat'l Life Ins. Services, Inc.,
-- F.3d --, No. 97-20645, 1999 WL 680319
(5th Cir. Sept. 1, 1999) 15, 17

Wolk v. UNUM Life Insurance Company of America,
No. 98-3542, 1999 WL 437286 (3d Cir. June 30,
1999) 18, 21

CONSTITUTIONS

U.S. Const. Art. VI, cl. 2 2

STATUTES

28 U.S.C. § 1254 1
28 U.S.C. § 1332 10
29 U.S.C. § 1001 . . . . . passim
29 U.S.C. § 1002(1) . . . . . passim
29 U.S.C. § 1002(7) . . . . . passim
29 U.S.C. § 1002(8) . . . . . passim
29 U.S.C. § 1132(a) . . . . . passim
29 U.S.C. § 1144(a) 5, 24, 25

RULES

Sup. Ct. R. 10 10

LEGISLATIVE HISTORY

H.R. Rep. No. 93-807 (1974) 23

OPINIONS BELOW

The opinion and order of the three-judge panel of the United States Court of Appeals for the Third Circuit is not yet reported in West's Federal Reporter, Third Series. The opinion is available online at 1999 WL 437286 and the opinion and order are reprinted below at Appendix A and Appendix B, respectively. That court's order denying Petitioner's Petition for Rehearing En Banc is also not generally reported and is reprinted at Appendix E.

The relevant opinion and order of the United States District Court for the Western District of Pennsylvania are unreported. That court's March 31, 1998 Memorandum Opinion and Order granting UNUM's motion for summary judgment is reprinted at Appendix D. Its June 22, 1998 order certifying the March 31, 1998 order for interlocutory appeal is reprinted at Appendix C.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit issued its Opinion on June 30, 1999. On July 13, 1999, Petitioners filed a Petition for Rehearing *En Banc* that the Third Circuit denied on July 29, 1999. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The jurisdiction of this Court arises under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Art. VI, cl. 2
Supremacy Clause

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * * *

29 U.S.C. § 1001

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce

because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries . . . that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

* * * * *

29 U.S.C. § 1002(1)

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employee or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services . . . .

* * * * *

29 U.S.C. § 1002(7)

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefits.

* * * * *

29 U.S.C. § 1002(8)

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

* * * * *

29 U.S.C. § 1132(a)

(a) Persons empowered to bring a civil action.

(1) by a participant or beneficiary -

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . .;

* * * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

* * * *

29 U.S.C. § 1144(a)

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan....

STATEMENT OF THE CASE

A. Background

An employer wrongfully deprived of employment benefits, such as Janice Bowers Wolk, is not subject to ERISA, 29 U.S.C. § 1001 et seq., and should be allowed to pursue traditional state law remedies. UNUM Life Insurance Company of America ("UNUM") attempts to wield ERISA, a remedy that Congress enacted to protect employee benefits, as a shield against its bad faith conduct towards its insured. UNUM asserts that Mrs. Wolk, as an insured under a UNUM disability policy, must seek redress for her injuries under ERISA, which provides remedies much narrower than those available under state law. If Mrs. Wolk cannot pursue traditional state law remedies for her injuries, she will be deprived of an effective remedy because she will not be able to pursue claims for insurance bad faith that would address UNUM's bad faith tactics and unjustified denial of benefits. Moreover, a reading of ERISA to apply to Mrs. Wolk creates a conflict among at least three ERISA statutory provisions, contravenes the express legislative purpose of ERISA and preempts state law in contravention of constitutional principles of federalism.

1. The Parties

Mrs. Wolk is an attorney and former corporate tax partner at the Pittsburgh, Pennsylvania law firm of Eckert Seamans Cherin & Mellott ("Eckert Seamans" or the "Firm"). At all times relevant to this action, Eckert Seamans was a Pennsylvania general partnership. As an equity partner of a general partnership, Mrs. Wolk had voting rights, shared in profits and losses, participated in management, had partial ownership of the firm's assets, had exposure to liability and

was required to file estimated tax returns with the Internal Revenue Service. Unlike employees of the Firm, no amounts for payment of taxes were withheld from her pay checks.

UNUM is a corporation organized and existing under the laws of the State of Maine with its principal place of business in Portland, Maine. Starting in 1978, Eckert Seamans provided its employees with group long-term disability insurance coverage under a Group Long Term Disability Insurance Policy, Policy No. 58927, that UNUM issued. Under the policy, UNUM agreed to provide benefits to certain of the Firm's employees in the event of disability. Before September 25, 1990, partners of the Firm were excluded from coverage for disability benefits.

On December 21, 1990, Eckert Seamans entered into Amendment No. 10 to the Group Policy No. 58927, the effective date of which was September 25, 1990 (the "1990 Policy"). The 1990 Policy continued coverage of the Firm's associates and support staff and covered the Firm's partners for the first time. Partners of the Firm, designated as Class One, paid the entire cost of each of their disability insurance coverage policies. No contribution was required from the Firm's employees, designated as Class Two and Class Three.

At all times relevant to this litigation, the insurance policies between UNUM and the Firm's partners were individual insurance contracts between the individual partners of the Firm and UNUM. Eckert Seamans' administrators facilitated placement of the partners' individual insurance contracts and obtained discounted premiums for the individual partners because of the Firm's participation in the Group Long Term Disability Income Plan that the Firm purchased for its employees. The Firm's administrators intended, by applying for insurance coverage as a group, to obtain a

discount on the regular cost of individual income policies to reduce each partner's individual premium payments.

Mrs. Wolk submitted all payments as required under the 1990 Policy. Accordingly, Mrs. Wolk was covered by the 1990 Policy and was entitled to make a claim for benefits should she become disabled as defined in the 1990 Policy.

2. Mrs. Wolk's Disability

In 1990, Mrs. Wolk was diagnosed with Chronic Fatigue Syndrome ("CFS") after she underwent numerous tests to eliminate the possibility that other immune system diseases caused her illness.[1] Ultimately, Mrs. Wolk's condition deteriorated to the point at which, in 1992, she could no longer function as a corporate tax partner.

3. UNUM's Handling of Mrs. Wolk's Disability Benefits

In March of 1993, Mrs. Wolk submitted an application to UNUM for disability benefits based on her diagnosis of CFS. On June 9, 1993, UNUM deemed Mrs. Wolk "disabled" under the terms of the 1990 Policy and approved Mrs. Wolk's application for disability payments effective March 27, 1993. Mrs. Wolk then began receiving monthly payments pursuant to the 1990 Policy.

Without any prior indication of an intention to terminate or of a need for additional information or testing,

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[1] CFS is a debilitating illness indicated by a variety of symptoms that may vary in duration and severity. The illness is characterized by debilitating fatigue and general flu-like symptoms as well as difficulty in concentration.

UNUM advised Mrs. Wolk, on March 23, 1995, that it had unilaterally determined that she was no longer "disabled" and that her benefits would be terminated four days later, effective March 27, 1995. Mrs. Wolk's condition did not change, however, between the date that UNUM deemed Mrs. Wolk to be disabled and the date, two years later, that UNUM terminated her benefits.

Despite repeated requests, UNUM utterly failed to explain adequately to Mrs. Wolk's counsel the reason for the termination of benefits. In fact, UNUM engaged in a consistent pattern of bad faith, as well as a failure to follow ERISA procedures, which UNUM asserts apply to this case. UNUM continually refused to conduct a good faith investigation into the facts of her claims. UNUM chose instead to follow a course of harassment, including surveillance of Mrs. Wolk and withholding of the results of her independent medical examination. Moreover, while the Social Security Administration and independent medical examiners unanimously determined that Mrs. Wolk was disabled and entitled to monthly disability benefits, UNUM never responded to the Social Security Administration's notification. Even upon finally conceding that Mrs. Wolk was disabled from CFS and thus entitled to benefits – an admission that occurred on the same day that Mrs. Wolk filed this lawsuit - UNUM failed to pay her back benefits for over three (3) months, and then only upon demand from her attorneys. Because of UNUM's bad faith conduct, Mrs. Wolk incurred substantial attorneys' fees in seeking restoration of her benefits.

B. Procedural History

1. Proceedings in the United States District Court for the Western District of Pennsylvania

On February 27,1996, after ten months of repeated demands for an explanation as to why UNUM terminated Mrs. Wolk's benefits, Mrs. Wolk commenced an action against UNUM in the United States District Court for the Western District of Pennsylvania. The district court had jurisdiction over the action on the basis of diversity of citizenship under 28 U.S.C. § 1332. In her suit, Mrs. Wolk set forth state common law and statutory claims for breach of contract, bad faith and breach of good faith and fair dealing.

In her Complaint, Mrs. Wolk alleged not only that UNUM acted in bad faith in abruptly and without explanation or cause terminating her benefits, but also by directing an incompetent and unduly intrusive investigation. Mrs. Wolk further alleged that UNUM employs an internal policy that actually encourages the disallowance of CFS disability claims. After some discovery, UNUM moved for summary judgment.

The district court granted UNUM's motion by Memorandum Opinion and Order, dated March 31, 1998 (App. D at 39a).[2] It held that ERISA preempted Mrs. Wolk's state common law and statutory claims. In particular, the district court held that under ERISA's plain language, Mrs. Wolk was an ERISA "beneficiary" (App. D at 36a-37a).

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[2] Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme court Rule 14(i).

2. Appeal to the United States Court of Appeals for the Third Circuit

On June 22, 1998, the district court certified the ERISA preemption issue for interlocutory appeal to the United States Court of Appeals for the Third Circuit. The appeal to the Third Circuit proffered the following assignments of error:

a. The district court's opinion was inconsistent with the common law definitions of "employer" and "employee," as set forth in Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992);

b. The district court's holding that Mrs. Wolk is subject to ERISA was contrary to the view of the majority of the United States Courts of Appeals; and

c. The district court erred in holding that ERISA preempted the state law claims of Mrs. Wolk, who was a partner, not an employee.

3. The Decision of the Third Circuit

On June 30, 1999, a three-judge panel of the Third Circuit issued an opinion in which it affirmed the district court's decision. First, the Third Circuit held that based upon the plain language of the statute, a "beneficiary," within the meaning of § 1002(8) of ERISA, could be either a person designated by an ERISA participant, or a person designated by the terms of an ERISA plan (App. A at 7a-8a). The Third Circuit reached this conclusion even though Congress

nowhere in the ERISA statute distinguished among "types" of beneficiaries.

Second, the Third Circuit reasoned that permitting Mrs. Wolk to pursue her state law claims would give rise to a system in which some insureds could pursue claims under state law, while other insureds under the same policy could proceed only under ERISA (App. A at 11a). "Such a scenario would frustrate Congress's intent of achieving uniformity in the law governing employment benefits" (App. A at 11a).[3]

4. Petition for Rehearing

Mrs. Wolk filed a Petition for Rehearing *En Banc* on July 13, 1999. She submitted that the Third Circuit erred in holding that ERISA preempted her state law claims. The Third Circuit denied the petition for rehearing on July 29, 1999 (App. E at 41a).

REASONS FOR GRANTING THE WRIT

Rule 10 of this Court's Rules sets forth the circumstances under which this Court will grant a petition for writ of certiorari:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following,

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[3] It should be noted, however, that provisions of the disability policy relating to Class One beneficiaries were not identical to those of Class Two and Class Three beneficiaries concerning the standard to be met in defining "disability."

although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;
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> ****
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Under the above criteria, the questions presented here are ripe for review. The first question, whether an employer wrongfully deprived of self-acquired employment benefits is subject to ERISA, 29 U.S.C. § 1132(a), and is therefore precluded from seeking traditional state law remedies, is the subject of an irreconcilable conflict among ten of the United States Courts of Appeals. The First, Fourth, Fifth, Sixth, Seventh and Tenth Circuits have held correctly that an employer wrongfully deprived of self-acquired employment benefits is not subject to ERISA and can therefore pursue traditional state law remedies. The Eighth, Ninth and Eleventh Circuits, as well as the Third Circuit in this case, have reached a contrary conclusion. Those Circuits have reasoned that an employer is a "beneficiary," as defined in 29

U.S.C. § 1002(8), of an "employee welfare benefit plan," as defined in 29 U.S.C. § 1002(1), maintained for "participants and their beneficiaries," as set forth in 29 U.S.C. § 1002(1). A reading of ERISA that categorizes employers as "beneficiaries" under 29 U.S.C. § 1002(8), however, creates a conflict among 29 U.S.C. §§ 1002(1), 1002(7) 1002(8) of ERISA. The logical reconciliation of these provisions is that only employees who are "participant[s]," as defined in 29 U.S.C. § 1002(7), in an "employee welfare benefit plan," as defined in 29 U.S.C. § 1002(1), maintained for "participants and their beneficiaries," as set forth in 29 U.S.C. § 1002(1), are subject to ERISA, 29 U.S.C. 1132(a), while employers deprived of self-acquired employment benefits are not subject to the statute. The legislative purpose of ERISA, as expressed in 29 U.S.C. § 1001, supports this statutory interpretation.

The second question is whether application of ERISA to an employer wrongfully deprived of self-acquired employment benefits unconstitutionally preempts traditional state law remedies for bad faith denial of insurance coverage. This question is appropriate for review because ERISA does not unambiguously require such a preemption and such a preemption conflicts with ERISA's legislative purposes.

A. An Employer Wrongfully Deprived of Employment Benefits is not Subject to ERISA, 29 U.S.C. § 1132(a), and Can Therefore Pursue Traditional State Law Remedies.

ERISA permits "participants" or "beneficiaries" of an "employee welfare benefit plan" to recover for deprivations of benefits under the plan. 29 U.S.C. § 1132(a). An "employee welfare benefit plan" is a program maintained to

provide "participants and their beneficiaries" certain insurance or other benefits. 29 U.S.C. § 1002(1) (emphasis added); see also 29 U.S.C. § 1001. A "participant" is an "employee or former employee of an employer." 29 U.S.C. § 1002(7). A "beneficiary" is a person designated by a "participant" or by the terms of an "employee welfare benefit plan" to receive benefits under the plan. 29 U.S.C. § 1002(8). There is no dispute that under 29 U.S.C. §§ 1002(1), 1002(7) and 1132(a), an employee must seek redress for deprivation of employment benefits under ERISA. Recently, however, the United States Court of Appeals for the Fifth Circuit stated: "The Circuits are not in accord as to whether an individual partner, sole proprietor, or shareholder may be a 'participant' in an ERISA plan established for the business's employees." Vega v. Nat'l Life Ins. Services, Inc., -- F.3d --, No. 97-20645, 1999 WL 680319, at *7 (5th Cir. Sept. 1, 1999). The Fifth Circuit's statement reflects the irreconcilable conflict among the United States Courts of Appeals over whether an employer deprived of self-acquired employment benefits is covered by ERISA or by state law remedies.

1. The First, Fourth, Fifth, Sixth, Seventh and Tenth Circuits have held that an employer is not subject to ERISA and therefore can only pursue traditional state law remedies.

The United States Court of Appeals for the Seventh Circuit held that "[a]n employer cannot ordinarily be an employee ... under ERISA." Giardono v. Jones, 867 F.2d 409, 411 (7th Cir. 1989). Applying Giardono, the United States District Court for the Northern District of Illinois held that a law firm partner could not sue under ERISA for

wrongful recission of health insurance coverage. Madden v. Country Life Ins. Co., 835 F. Supp. 1081, 1086 (N.D. Ill. 1993). According to the Madden court, the law firm partner was neither an ERISA "participant" nor "beneficiary" entitled to the statute's protection. Id. at 1087. "ERISA excludes partners from its protections." Id. In reaching its holding, the court stated that an owner, whether a sole proprietor or partner, does not qualify as an "employee" under ERISA. Id. at 1086.[4]

In Fugarino v. Hartford Life & Accident Insurance Company, 969 F.2d 178 (6th Cir. 1996), the United States Court of Appeals for the Sixth Circuit reached a similar conclusion. The Fugarino plaintiff purchased a group health insurance policy covering several employees and him. Id. at 186. A dispute arose over the plaintiff's insurance coverage and the remedies available for denial of benefits under the insurance policy. Id. The Sixth Circuit held that a sole proprietor or sole shareholder of a business was an employer and not an employee for purposes of ERISA. Id. at 186. See also Kwatcher v. Massachusetts Service Employees Pension Fund, 879 F.2d 957, 960 (1st Cir. 1989) ("[o]nce a person has been found to fit within the 'employer' integument, ERISA prohibits payments to him from a qualified plan"); Peckham v. Board of Trustees, 653 F.2d 424, 427 (10th Cir. 1981) (union members who were sole proprietors and who hired other union members to work with them were not eligible for participation in a pension fund as dual status

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[4] The United States District Court for the Northern District of Indiana refused to follow Madden. Eichhorn, Eichhorn & Link v. Travelers Ins. Co., 896 F. Supp. 812, 814 (N.D. Ind. 1995). Nevertheless, the court agreed that "Congress did not mean to protect employers" in enacting ERISA. Id.; but see Spurlock v. Employers Health Ins. Co., 13 F. Supp. 2d 884 (E.D. Wis. 1998).

employers/employees); Harris v. TMG Life Ins. Co., 915 F. Supp. 869, 872-73 (S.D. Tex. 1996) (sole proprietor who purchased group health insurance policy for himself and his two employees was not a participant in an employee welfare benefit plan because he was an employer). Furthermore, the United States Courts of Appeals for the Fifth and Fourth Circuits recognize that employer/employee status determines whether an individual's claims are subject to ERISA. Vega, 1999 WL 680319, at *7; Madonia v. Blue Cross and Blue Shield of Virginia, 11 F.3d 444 (4th Cir. 1993).

Under the above precedents, an employer deprived of self-acquired employment benefits, such as Mrs. Wolk[5], is not subject to ERISA and can therefore pursue traditional state law remedies.

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[5] This Court recognizes that a person's status as an employer or employee is determined under common law. Darden, 503 U.S. at 323. In Darden, this Court enumerated factors relevant to determination of an individual's employment status, including the individual's role in hiring and paying assistants, tax treatment, right to control the work, method of payment and discretion over when and how long to work. Id. Mrs. Wolk, as a partner in a general partnership, is an employer. Hull v. Rose, Schmidt, Hasley & DiSalle P.C., 700 A.2d 996, 1001 (Pa. Super. Ct. 1997) (the Superior Court of Pennsylvania held that a general partner in a law firm was an employer, not an employee, within the meaning of the Pennsylvania Human Relations Act).

2. The Eighth, Ninth and Eleventh Circuits, as well as the Third Circuit in this case, have held that an employer deprived of self-acquired employment benefits is subject to ERISA, and is therefore precluded from pursuing traditional state law remedies.

In reaching its decision in Engelhardt v. Paul Revere Life Ins. Co., the United States Court of Appeals for the Eleventh Circuit reasoned that shareholders who work in a business are employees because the corporation is a legal entity separate and distinct from its shareholders. 139 F.3d 1346 (11th Cir. 1998). The other three circuits, including the court below, have held that any person designated to receive benefits under an employee welfare benefit plan is a "beneficiary" within the meaning of ERISA. Wolk v. UNUM Life Insurance Company of America, No. 98-3542, 1999 WL 437286, at *7 (3d Cir. June 30, 1999); Prudential Ins. Co. of Am. v. Doe, 76 F.3d 206, 208 (8th Cir. 1996); Peterson v. Am. Life & Health Ins. Co., 48 F.3d 404, 409 (9th Cir. 1995). These Circuits have held that an employer could be an ERISA "beneficiary" even though the same employer could not be an ERISA "participant."

This Court should resolve the conflict among the United States Courts of Appeals as to whether an employer deprived of self-acquired employment benefits is subject to ERISA or can pursue traditional state law remedies. An examination of the ERISA statute, however, demonstrates that the reading of ERISA posited by Eighth, Ninth and Eleventh Circuits, as well as the Third Circuit in this case, under which an employer may be the "beneficiary" of an "employee welfare benefit plan," is wrong and creates a

conflict within the statute.

3. Inclusion of employers in an "employee welfare benefit plan," as defined in 29 U.S.C. § 1002(1), creates a conflict among 29 U.S.C. §§ 1002(1), 1002(7) and 1002(8) of ERISA.

It is undisputed that ERISA's statutory language must be interpreted according to its plain meaning (App. at 7a); Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 835 (1990) (quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)); Idahoan Fresh v. Advantage Produce, Inc., 157 F.3d 197, 202 (3d Cir. 1998). There is also no dispute that ERISA, by its plain language, applies only to participants and beneficiaries entitled to benefits under an "employee welfare benefit plan." See 29 U.S.C. §§ 1002(1), 1002(7), 1002(8), 1132(a). As discussed below, an "employee welfare benefit plan" covers only ERISA participants and their beneficiaries. See 29 U.S.C. § 1002(1).

a. An employer cannot be a "participant," as defined in 29 U.S.C. § 1002(7), in an "employee welfare benefits plan," within the meaning of 29 U.S.C. § 1002(1)

"Participant[s]" within the meaning of ERISA are employees and former employees of the employer who are entitled to receive an ERISA plan benefit. 29 U.S.C. § 1002(7). An employer such as Mrs. Wolk, by definition, is not an employee and cannot be a "participant" within the

meaning of ERISA. Thus, under the plain meaning of ERISA, as set forth in 29 U.S.C §§ 1002(1) and 1002(7), the statue protects only employees who are "participant[s]" in an "employee welfare benefit plan"[6] maintained for "participants and their beneficiaries." This statutory interpretation does not, however, address whether inclusion of an employer as a "beneficiary" under 29 U.S.C. § 1002(8) of an "employee welfare benefit plan" subjects an employer deprived of employment benefits to ERISA's statutory remedies.

b. The broad definition that the Eighth, Ninth and Eleventh Circuits, as well as the Third Circuit in this case, ascribe to the term "beneficiary" renders the term "participant" moot.

The United States Courts of Appeals that have held that employers must seek redress for deprivation of self-acquired employment benefits under ERISA generally have determined that those employers were "beneficiaries" within the meaning of ERISA, 29 U.S.C. § 1002(8). See Wolk,

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[6] Contrary to the Third Circuit's averment, it is not undisputed that the Policy qualifies as an ERISA employee welfare benefit plan as the Policy pertains to Mrs. Wolk and other Firm partners (App. A at 5a, 7a). Mrs. Wolk asserted in her brief to the Third Circuit only that the group long-term disability insurance policy that Eckert Seamans purchased was an ERISA plan as it related to the employees of the Firm (Brief of Appellant to the United States Court of Appeals for the Third Circuit, at 15). In that same brief, Mrs. Wolk disputed, however, that the Policy was an ERISA employee welfare benefit plan as it pertained to the Firm's partners. See 29 U.S.C. § 1002(1).

1999 WL 437286, at *7; Prudential Ins. Co. of Am., 76 F.3d at 208; Peterson, 48 F.3d at 409. "The term 'beneficiary' means a person designated by a participant, or by the terms of any employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8). Under the Panel's holding, "beneficiary" encompasses any person with a claim to plan benefits. (App. at 10a-11a).

If the Third Circuit's interpretation of an ERISA "beneficiary" were correct, there would have been no reason for Congress to define the separate categories of "participant" and "beneficiary." Rather, "beneficiary" would encompass "participant" because a "participant" is entitled to receive plan benefits. 29 U.S.C. § 1002(7). The Panel's interpretation of beneficiary therefore renders the term "participant" moot. Moreover, as to Mrs. Wolk, § 1002(1) indicates that the Policy was not, by definition, an "employee welfare benefit plan." Accordingly, the inclusion of employers in the "beneficiary" category creates a conflict among 29 U.S.C. §§ 1002(1), 1002(7) and 1002(8). Section 1002(1) states that an "employee welfare plan" is a program maintained for participants and the participants' beneficiaries, but an employer cannot be a participant under § 1002(7). The conflict in ERISA, however, may be reconciled by following a logical reading of the statute.[7]

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[7] This Court also recognizes that the scope of ERISA's coverage is unclear. Darden, 503 U.S. at 323.

4. A logical reading of ERISA demonstrates that a "beneficiary" is a person who is designated by a "participant" or, in the event the participant fails to make a designation, who is designated by default under the terms of the "employee welfare benefit plan" such that an employer is not a "beneficiary."

The logical reconciliation of the conflict among §§ 1002(1), 1002(7) and 1002(8) is that the language of § 1002(8) (beneficiaries include persons designated to receive benefits "by the terms of an employee benefit plan") is meant to provide a default beneficiary if the employee/participant does not provide one. For example, 401(k) plans provide that a spouse automatically becomes the beneficiary of the plan if the participant dies, unless the participant designates another beneficiary. A pension or life insurance policy may incorporate by reference the intestacy laws of the relevant state to provide a beneficiary designation if the employee/participant does not designate a beneficiary. Therefore, the logical reading of the statute demonstrates that Congress understood "beneficiaries" to be individuals designated by participants or, in the absence of such designation, supplied by operation of law.[8] As addressed in

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[8] Under § 1132(a), a plan participant or beneficiary may bring a civil action to recover benefits and enforce or clarify rights under the plan. 29 U.S.C. § 1132(a). That is, a participant or a participant's beneficiary (whether designated by the beneficiary or by operation of law) may bring a civil action for ERISA benefits. The definition of beneficiary that Mrs. Wolk espouses therefore protects employees and their beneficiaries, as Congress intended.

the following section, congressional statement of ERISA's purpose supports this interpretation.

5. The legislative purpose of ERISA, as expressed in 29 U.S.C. § 1001, is to protect employee benefits.

Congressional findings and the declaration of policy for ERISA show that Congress sought protection of the employee participant and the employee participant's beneficiary. See 29 U.S.C. § 1001; H.R. Rep. No. 93-807, at 4670 (1974). As a basis for the enactment of ERISA, Congress stated that "the continued well-being and security of millions of employees and their dependents are directly affected by these plans" and that by termination of plans before they were fully funded "employees and their beneficiaries have been deprived of anticipated benefits ...." 29 U.S.C. § 1001 (emphasis added). Congress also stated that ERISA's purpose was "to protect interstate commerce and the interests of participants in employee benefits plans and their beneficiaries." 29 U.S.C. § 1001 (emphasis added). Moreover, Third Circuit precedent also shows that Congress sought protection of employees and their beneficiaries through ERISA. In Matinchek v. John Alden Life Insurance Company, the Third Circuit stated that "Congress enacted ERISA to protect participants in employee benefit plans and their [the employees'] beneficiaries." 93 F.3d 96, 99 (3d Cir. 1996) (emphasis added). Given congressional concern with employees and their need for protection in the wake of employer abuses, Congress cannot have intended to bring employers such as Mrs. Wolk into ERISA's jurisdiction under the guise of a "beneficiary" in § 1002(8), after it excluded employers in §§ 1002(1) and 1002(7).

Recognition that a "beneficiary" for purposes of ERISA is a person designated by a participant to receive benefits also promotes uniformity of decision. "[I]n the context of ERISA, maintaining uniformity of decisions is an important consideration when fashioning federal common law rules." Matinchek, 93 F.3d at 101 n.4 (citing Northeast Dept. ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund, 764 F.2d 147, 159 (3d Cir. 1985)). Interpretation of an ERISA "beneficiary" as a person designated by an ERISA "participant" to receive benefits not only comports with ERISA's statutory language and is logically consistent, but also promotes uniformity of ERISA decisions by creating only two categories of ERISA jurisdiction. Employees covered by an employee welfare benefit plan could seek redress for deprivation of benefits under ERISA. Employers deprived of self-acquired employment benefits could seek redress only under state law and not under ERISA.

B. Application of ERISA, 29 U.S.C. § 1001 et seq., to an Employer Wrongfully Deprived of Self-Acquired Employment Benefits Preempts Traditional State Law Remedies in Contravention of Constitutional Principles of Federalism because ERISA Does Not Unambiguously Require such a Preemption and because such a Preemption Conflicts with the Legislative Purpose of ERISA as Expressed in 29 U.S.C. § 1001.

Under Article VI of the United States Constitution, Congress may preempt state law. California v. ARC Am. Corp., 490 U.S. 93, 101 (1989). ERISA preempts state laws "insofar as they may now or hereafter relate to any employee benefit plan...." 29 U.S.C. § 1144(a). There is, however, a

"presumption against finding pre-emption of state law in areas traditionally regulated by the States," such as insurance contract law. Id.; ARC Am. Corp., 490 U.S. at 100; Blair v. Berkshire Life Ins. Co., 429 F.2d 996, 1000 (3d Cir. 1970) (the Third Circuit held that an insurance policy is a contract to be interpreted according to state law and "stands on no different basis than [sic] any other contract"); Cury v. Colonial Life Ins. Co., 737 F. Supp. 847, 853 (E.D. Pa. 1990) (court interpreted ERISA policy according to Pennsylvania contract law principles). Moreover, federal law may not preempt state law absent clear and manifest congressional intent to do so. ARC Am. Corp., 490 U.S. at 101. To determine "whether the normal presumption against pre-emption has been over come in a particular case ... [a court] 'must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.'" De Buono v. NYSA-ILA Medical and Clinical Services, 520 U.S. 806, 813-814 (1997) (quoting New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995)).

In De Buono, this Court reversed the decision of the United States Court of Appeals for the Second Circuit, which held that ERISA preempted the State of New York's gross receipts tax on medical centers operated by an ERISA fund (the "Fund"). 514 U.S. at 810. New York imposed the gross receipts tax on all hospital patient services to defray rising Medicaid costs. Id. The Fund, which administered "a self-insured, multiemployer welfare benefit plan," alleged that ERISA preempted the gross receipts tax under ERISA, 29 U.S.C. § 1144(a), because the tax was a state law that related to an ERISA "employee welfare benefit plan." Id. The Court held that Fund did not overcome the burden

against ERISA preemption of state law because the gross receipts tax was a state law of general applicability that incidentally burdened the administration of an ERISA plan. Id. at 815. In reaching its conclusion, this Court noted that "the historic police powers of the State include the regulation of matters of health and safety." Id. at 814.

Similarly, the burden against ERISA preemption of state law has not been overcome in this case. Congress manifested an intent under ERISA to protect employee pensions and benefits and, therefore, preempted state law in the area of employee pension and benefit protection. See 29 U.S.C. § 1001.

Although the scope of ERISA's employee protection is unclear, see Darden, 503 U.S. at 323, ERISA nowhere manifests an intent - clear or otherwise - to preempt employers' state law rights vis-à-vis pensions and benefits (e.g., the right to bring an improper denial and bad faith action related to an insurance policy), an area of traditional state regulation. See 29 U.S.C. §§ 1001, 1002(1); Blair, 429 F.2d at 1000. In fact, congressional intent, to the extent expressed in the statute or legislative history, is explicitly to the contrary. 29 U.S.C. § 1001. The Third Circuit's decision, therefore, both deprives employers such as Mrs. Wolk of their state law contract rights and denies states the right to regulate insurance disputes that involve non-employee group insurance, despite ERISA's lack of congressional intent to do so. If Mrs. Wolk is forced to proceed under ERISA, she will be denied an effective remedy to redress UNUM's conduct. Under ERISA, Mrs. Wolk, or any employer similarly situated, could not pursue bad faith or other claims brought in an effort to address the insurer's outrageous denial tactics. The Third Circuit's decision therefore violates the presumption against federal preemption of regulatory areas

traditionally reserved to the states and the presumption against federal preemption absent clear congressional intent.

CONCLUSION

For these reasons, Janice Bowers Wolk's Petition for Writ of Certiorari should be granted, the Third Circuit Opinion dated June 30, 1998 should be vacated, and the judgment of the United States District Court for the Western District of Pennsylvania dated March 31, 1998 should be reversed.

Respectfully submitted:

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Dated: October 26, 1999

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Filed June 30, 1999]

No. 98-3542

JANICE BOWERS WOLK,
Appellant,

v.

UNUM LIFE INSURANCE OF AMERICA,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 96-cv-00356)
(District Judge: Honorable Robert J. Cindrich)

ARGUED FEBRUARY 19, 1999
BEFORE: GREENBERG, LEWIS, and BRIGHT,*

* Honorable Myron H. Bright, Senior Circuit Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Circuit Judges.

(Filed June 30, 1999)

OPINION OF THE COURT

LEWIS, *Circuit Judge.*

In this appeal, we must determine whether the term "beneficiary," as defined under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002(8), includes partner-employers who are designated to receive benefits under an "employee welfare benefit plan."[1] We conclude that it does. Accordingly, we will affirm the judgment of the District Court.

I.

Janice Bowers Wolk is an attorney and former corporate tax partner at the Pittsburgh law firm of Eckert,

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[1] ERISA defines an "employee welfare benefit plan" as:

> any plan, fund, or program which was . . . or is . . . established or maintained by an employer. . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment ....

29 U.S.C. § 1002(1).

Seamans, Cherin & Mellot ("Eckert Seamans" or "the firm"). Since 1978, Eckert Seamans has provided its employees with disability insurance coverage under a group long term insurance policy issued by UNUM Life Insurance Company of America ("UNUM"). Originally, the policy did not provide disability coverage for the firm's partners. However, on December 21, 1990, Eckert Seamans replaced the existing policy with a new policy that continued disability coverage for the firm's employees and added coverage for the firm's partners (the "1990 Policy").[2]

In May 1990, Wolk was diagnosed with chronic fatigue syndrome -- a debilitating illness that causes extreme fatigue, general flu-like symptoms and difficulty with concentration. Through 1992, Wolk's condition deteriorated to the point where she could no longer function as a partner at the firm. As a result, Wolk terminated her partnership effective March 31, 1993.

Shortly thereafter, Wolk applied to UNUM for disability benefits pursuant to the 1990 Policy. UNUM approved Wolk's application and commenced disability payments effective April 1, 1993. The payments continued without incident until March 23, 1995, at which time, UNUM

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[2] Under the 1990 Policy, partners and the executive director of the firm were designated as Class One of the defined eligible classes. Associates and certain other professional employees were designated as Class Two. All other employees were designated as Class Three. Partners paid the entire cost of their disability insurance coverage. No contribution was required from the firm's Class Two and Class Three employees.

informed Wolk that it had determined that she was no longer disabled and that it would terminate her benefits effective March 27, 1995.

On February 27, 1996, Wolk filed suit against UNUM in the United States District Court for the western District of Pennsylvania. The complaint alleged a variety state-law claims, including breach of contract, bad faith, and breach of good faith and fair dealing.[3] That same day, UNUM notified Wolk that it was reversing its decision to deny her benefits. On May 22, 1996, UNUM resumed Wolk's disability payments and issued her a check for back benefits.[4]

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[3] More specifically, Wolk alleges that UNUM terminated her benefits without providing any prior indication of its intention, or of a need for additional information or testing concerning her condition. Wolk also maintains that despite her repeated requests, UNUM failed to adequately explain the reason for the termination of benefits. Further, she asserts that UNUM engaged in a consistent pattern of bad faith, which included its failure to conduct a good faith investigation into the facts of her claim. Finally, Wolk contends that UNUM "unnecessarily dragged out the 'investigation' of her claim causing her to go without the disability benefits to which she was entitled for fourteen months, and to incur substantial attorneys' fees in her struggle to compel UNUM to reinstate her benefits." Appellant's Brief at 12.

[4] UNUM delivered a check to Wolk in the amount of $59,374.39, representing benefits from March 27, 1995 through May 27, 1996, less offsetting Social Security disability benefits. On June 20, 1996, UNUM issued Wolk a check in the amount of $3,197.50, representing interest on her back benefits at the rate of six percent.

Presently, Wolk receives all monthly benefits from UNUM, as well as disability benefits from the Social Security Administration.

On December 6, 1996, UNUM filed a motion for summary judgment on the grounds that ERISA preempted Wolk's state-law claims. On March 31, 1998, the District Court granted UNUM's motion for summary judgment, finding that partner-employers who share coverage under a common disability insurance policy with employees are "beneficiaries" as defined in ERISA. Thus, the District Court held that Wolk's state-law claims against UNUM were subject to ERISA's preemptive provisions. In so holding, the District Court granted Wolk leave to amend her complaint to assert an ERISA cause of action. On June 22, 1998, the District Court granted Wolk's motion to certify its March 31, 1998 order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and we granted leave to appeal.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(b). We review a District Court's grant of summary judgment de novo. *See Antol v. Perry,* 82 F.3d 1291, 1294-95 (3d Cir. 1996).

II.

Before we turn to the dispute, it is important to note the areas of agreement between Wolk and UNUM. First, the parties agree that the 1990 Policy is an "employee welfare benefit plan" as defined in ERISA, 29 U.S.C. § 1002(1). Second, it is undisputed that Wolk, in her complaint, alleges that UNUM unlawfully deprived her of benefits to which she was entitled under the 1990 Policy. Third, the parties

acknowledge that ERISA provides the exclusive remedy for those covered by an ERISA plan who seek to enforce their rights under such a plan. *See* 29 U.S.C. § 1144(a).

However, the parties diverge on the question of whether Wolk, as a partner-employer of Eckert Seamans, is authorized to bring a civil action under ERISA. Wolk argues that because a law firm partner is an employer, not an employee, she cannot be a "participant" or "beneficiary" of an ERISA plan, and thus is not eligible to file suit under ERISA. Therefore, she maintains that she is entitled to pursue her common law remedies without reference to, or reliance on, ERISA.

In opposition, UNUM contends that Wolk's partnership status, though relevant to the question of whether she is a "participant" under the 1990 Policy, does not affect her status as a "beneficiary" under the plan. Thus, because Wolk receives benefits under the 1990 Policy, UNUM asserts that she must be subject to ERISA when pursing claims against the insurer.

We have not ruled on the limited question of whether a partner-employer who shares coverage with employees under an "employee welfare benefit plan" qualifies as a "beneficiary" with standing to bring suit under ERISA. However, we believe ERISA's plain statutory language provides a clear answer.

A.

We must begin our analysis with an examination of ERISA's statutory language because "'absent a clearly

expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 835 (1990) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania,* Inc., 447 U.S. 102, 108 (1980)); *see also Idahoan Fresh v. Advantage Produce, Inc.,* 157 F.3d 197, 202 (3d Cir. 1998) ("[w]here the statutory language is plain and unambiguous, further inquiry is not required, except in the extraordinary case where a literal reading of the language produces an absurd result.").

Under ERISA, "[a] civil action may be brought -- (1) by a participant or beneficiary -- (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). ERISA defines the term "participant" as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan." 29 U.S.C. § 1002(7). A "beneficiary" is a "person designated by a participant, or *by the terms of an employee benefit plan*, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8) (emphasis added).

To reiterate, it is undisputed that the 1990 Policy qualifies as an employee benefit plan under ERISA. It also is undisputed that partners of Eckert Seamans are designated to receive benefits under the 1990 Policy -- indeed, Wolk applied for, and is currently receiving, benefits from UNUM pursuant to the 1990 Policy. Applying the plain language of the statue to these facts, Wolk fits squarely within the second category of ERISA's definition of a plan "beneficiary." Thus,

we conclude that Wolk is a "beneficiary" under the 1990 Policy.

We also find it significant that all of the Courts of Appeal that have analyzed the term "beneficiary" in a similar context have adopted this plain language interpretation. *See, e.g., Engelhardt v. Paul Revere Life Ins. Co.*, 139 F.3d 1346, 1351 (11th Cir. 1998) ("[physician's] claim for benefits under the policy confirms his status as a plan beneficiary."); *Prudential Ins. Co. v Doe*, 76 F.3d 206, 208 (8th Cir. 1996) (shareholders of corporation were "beneficiaries" of ERISA plan because they were designated to receive benefits by the terms of the employee benefit plan); *Peterson v. American Life & Health Ins. Co.*, 48 F.3d 404, 409 (9th Cir. 1995) (partner was "beneficiary" under ERISA because "any person designated to receive benefits from a policy that is part of an ERISA plan may bring a civil suit to enforce ERISA"); *Harper v. American Chambers Life Ins. Co.*, 898 F.2d 1432, 1434 (9th Cir. 1990) (partner insured by policy that is part of an ERISA plan has standing to sue under ERISA as a "beneficiary").[5]

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[5] Although Wolk cites to a number of Court of Appeals decisions where the court held that an employer did not have standing to sue under ERISA, we believe these cases are distinguishable. More specifically, unlike the cases cited above, none of the decisions cited by Wolk engaged in an in-depth analysis of the term "beneficiary," nor did they address the same factual situation at issue here. *See, e.g., Meredith v. Time Ins. Co.*, 980 F.2d 352, 358 [5th Cir. 1993) (insurance plan purchased by sole proprietor, covering only herself and her spouse, did not constitute "employee welfare benefit plan"); F*ugarino v. Hartford Life and Accident Ins. Co.*, 969 F.2d 178, 185-86 (6th Cir. 1992) (health

Wolk contends that it would be contrary to the "clearly expressed legislative intention" of Congress for us to apply a plain language interpretation to section 1002(8). In particular, Wolk argues that such an interpretation is: (1) inconsistent with the use of the term "beneficiary" is the other provisions of ERISA; and (2) conflicts with ERISA's fundamental requirement that no plan asset may inure to the benefit of an employer. We disagree.

With respect to her first argument, Wolk maintains that the term "beneficiary" is used throughout ERISA to refer to persons who are designated by participants to receive benefits. *See, e.g.*, 29 U.S.C. § 1001(b) (declaring it the policy of ERISA to protect "the interests of participants in employee benefit plans and *their* beneficiaries"); 29 U.S.C. § 1002(1) (defining "employee welfare benefit plan" as a plan that is established or maintained "for the purpose of providing for its participants or their beneficiaries") (emphasis added in all). According to Wolk:

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insurance plan whose sole beneficiaries were company's owners cannot qualify as an "employee benefit plan" under ERISA; nor can employers qualify as "participants" of an ERISA plan); *Kwatcher v. Massachusetts Service Employees Pension Fund*, 879 F.2d 957, 959-60 (1st Cir. 1989) (ERISA's anti-inurement provision prohibits payments to employer from *qualified pension plan); Giardono v. Jones*, 867 F.2d 409, 411-12 (7th Cir. 1989) (sole proprietor cannot be "participant" of ERISA plan); *Peckham v. Board of Trustees of the Int'l Brotherhood of Painters*, 653 F.2d 424, 426-27 (10th Cir. 1981) (ERISA's anti-inurement provision prohibits employers from participating in employee pension benefit plans).

> [i]f UNUM's interpretation were correct, the language would read that an ERISA plan must provide for "its participants or its beneficiaries." The only logical reconciliation of these provisions is that the language of the statute (referring to those designated to receive benefits "by the terms of an employee benefit plan") is meant to encompass nothing more than a designation supplied by the terms of the employee benefit plan in lieu of a designation by the employee/participant. . . Therefore, the plain reading of the statute would indicate that Congress understood "beneficiaries" to be individuals designated by participants, or supplied by operation of law in the absence of such designation.

Appellant's Reply Brief at 5.

We fail to see how Wolk's interpretation is the "only logical reconciliation" of ERISA's use of the term "beneficiary." At most, it is just another way that ERISA's definition of a plan "beneficiary" might be satisfied -- since persons designated by operation of law are, by definition, "designated by the terms of the plan." The fact that "beneficiary" is used in other provisions of ERISA to refer to the beneficiaries of a participant does not necessarily mean that the term was only intended to refer to such persons. In defining the term, Congress was careful to include a category for the designees of a participant as well as a category for those designated by the terms of an ERISA plan. *See* 29 U.S.C. § 1002(8). Were we to limit the second category to those designated by operation of law, we would be

overstepping our bounds as a court of law. *See Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) (stating that courts must "respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction."). If Congress did not intend the phrase "by the terms of an employee benefit plan" to mean what it says, it is for Congress alone to correct. *See Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

Moreover, there is second compelling reason for adopting a plain language interpretation of section 1002(8). As several courts of appeals have noted, "[t]o hold otherwise would create the anomaly of requiring some insureds to pursue benefit claims under state law while requiring ERISA. Such a scenario would frustrate Congress's intent of achieving uniformity in the law governing employment benefits. *Peterson*, 48 F.3d at 409; *see also Prudential* 76 F.3d at 210; *Madonia v. Blue Cross & Blue Shield of Virginia,* 11 F.3d 444, 450 (4th Cir. 1993). We believe this rationale provides a logical explanation for why Congress chose to include persons designated "by the terms of an employee benefit plan" in the definition of "beneficiary." Accordingly, Wolk's argument is inadequate to overcome the statute's plain language. *See Mertens v. Hewitt Assoc.,* 508 U.S. 248, 261-62 (1993) ("vague notions of a statute's 'basic purpose' are. . . inadequate to overcome the words of its text. . . This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved

innumerable disputes between powerful competing interests. . . . (citations omitted)).

We also do not believe that the 1990 Policy invokes the concerns of ERISA's anti-inurement provision. *See* 29 U.S.C. § 1103(c)(1). ERISA's anti-inurement provision is directed at plan assets -- i.e., "assets accumulating in trust and pension funds." *Engelhardt,* 139 F. 3d at 1351. In *Prudential,* the court described the purpose of the anti-inurement provision as follows:

> the legislative history involving the [anti-inurement provision] indicates congressional concern over the wrongful diversion of trust assets and the administrative integrity of benefit plans. Section 1103(c)(1) and 29 U.S.C. § 1104(a) deal with fiduciary duties for plan administrators and employers. Congress included these provisions in order to make the law of trusts applicable to the plans and to eliminate such abuses as self-dealing imprudent investing, and misappropriation of plan funds.

Prudential 76 F.3d at 209 (internal citations omitted). However, the present case does not implicate these concerns. The 1990 Policy was administered exclusively by UNUM. The extent of Eckert Seamans involvement was the processing of paperwork and the payment of premiums for its employees. UNUM made all of the substantive decisions regarding the eligibility or ineligibility of beneficiaries for disability benefits, and paid all of the recovery benefits out of its own funds. In short, Eckert Seamans did not exercise the type of

control over the funds used to pay out disability benefits under the 1990 Policy that gives rise to the concerns of the anti-inurement provision. Accordingly, we do not believe ERISA's anti-inurement provision is an appropriate basis for deviating from the plain language of the statute.

III.

Because there is nothing in ERISA to advise against applying the plain language of section 1002(8) to Wolk's claims, we hold that Wolk is a "beneficiary" with standing to bring suit under ERISA. As a result, Wolk's state-law claims against UNUM, which derive from the 1990 Policy, are preempted by section 1144(a). Accordingly, the District Court's order granting summary judgment in favor of UNUM and allowing Wolk to amend her complaint to assert a cause of action under ERISA will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Filed June 30, 1999]

No. 98-3542

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JANICE BOWERS WOLK,
Appellant,

v.

UNUM LIFE INSURANCE OF AMERICA,

JUDGMENT

(D.C. No. 96-cv-00356)
District Judge: Honorable Robert J. Cindrich

Court of Appeals Judgment - 6/30/99

Present: Greenberg, Lewis and Bright,*
Circuit Judges

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel February 19,1999.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 31, 1998, be, and the same is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/_____
Clerk

Dated: June 30, 1999

Certified as a true copy and issued in lieu of a formal mandate on August 6, 1999

Teste:
/s/_____
Clerk, United Court of Appeals
for the Third Circuit

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* Honorable Myron H. Bright, Senior Circuit Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Filed June 24, 1998]

No. 96-356

JANICE BOWERS WOLK,
Plaintiff,

v.

UNUM LIFE INSURANCE OF AMERICA,
Defendant.

MEMORANDUM ORDER

Listed below are several motions currently pending on which the Court will now rule.

1) Plaintiff's Motion For Reconsideration Of Order Dated September 30, 1997, And Motion For Leave To File Amended Brief In Support Of Motion For Partial Summary Judgment (Doc. No. 38):

The Court issued a memorandum order dated September 30, 1997 denying plaintiff Janice Bowers Wolk's ("Wolk") motion for partial summary judgment on her breach of contract claim. Wolk then filed the instant motion for reconsideration of the September 30, 1997 memorandum order and motion for leave to file an amended brief in support of her previously filed motion for partial summary judgment. Subsequently, the Court granted defendant UNUM Life Insurance Company Of America's ("UNUM") motion for summary judgment holding that all of Wolk's state law claims are preempted by the Employee Retirement Income Security Act ("ERISA"). Accordingly, Wolk's motion for reconsideration and motion for leave to file an amended brief (Doc. No. 38) are **DENIED** as moot.

2) Plaintiff's Motion To Certify Order Of March 31, 1998 For Interlocutory Appeal And To Stay Proceedings Pending Disposition Of The Appeal (Doc. No. 41):

The Court issued a memorandum opinion and order dated March 31, 1998 granting UNUM's motion for summary judgment. The Court held that all of Wolk's state law claims are preempted by ERISA. Because Wolk had not asserted an ERISA claim, she was given thirty days to file an amended complaint.[1] Wolk then filed the instant motion to certify our

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[1] The Court signed an order on April 23, 1998 extending Wolk's time to file an amended complaint until thirty days following the entry of an order denying in whole or in part the instant motion to certify the March 31, 1998 order.

March 31, 1998 order for an interlocutory appeal and to stay the present proceedings pending disposition of the appeal, if an appeal is granted.

A district judge may, in his or her discretion, certify an order for interlocutory appeal pursuant to 28 U.S.C. Section 1292(b).[2] Orson, Inc. v. Miramax Film Corp., 867 F. Supp. 319, 320 (E.D. Pa. 1994). Section 1292(b)

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[2] Section 1292(b) reads as follows:

Interlocutory decisions

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. Section 1292(b) (emphasis in original).

"imposes three criteria for the district court's exercise of discretion to grant a § 1292(b) certificate. The order must (1) involve a "controlling question of law," (2) offer "substantial ground for difference of opinion" as to its correctness, and (3) if appealed immediately "materially advance the ultimate termination of litigation."" Katz v. Carte Blanche Corporation, 496 F.2d 747, 754 (3d Cir. 1974). The burden is on the movant to demonstrate each of these essential elements. Orson, 867 F. Supp. at 320.

Federal law expresses a strong policy against piecemeal litigation, however. Id. at 321 (citations omitted). Thus, certification is the exception, rather than the rule, to be used in exceptional cases where an immediate appeal would avoid protracted and expensive litigation. Id. (citations omitted).

Controlling Question of Law

The March 31, 1998 order was an order granting UNUM's motion for summary judgment based on the Court's finding that partner-owners who share coverage under a group health insurance policy with employees are subject to ERISA preemption when pursuing claims against the insurer. Wolk argues that if the Court of Appeals for the Third Circuit ultimately determines that her state law claims are not preempted by ERISA, such decision would reverse the March 31, 1998 order, and consequently any final judgment from a trial in this case under ERISA. Thus, she argues, the issue of ERISA preemption is a controlling question of law. UNUM does not contest Wolk's argument as to this element.

"A controlling question of law must encompass at the very least every order, which, if erroneous, would be reversible error on final appeal." Katz, 496 F.2d at 754. In the present case, Wolk must proceed with an ERISA claim if the case continues under the March 31, 1998 order, as her state law claims would be preempted. The standard of review, the damages recoverable, and the relevant factual issues differ significantly as between ERISA and state law claims. Also, there is no right to a jury trial under ERISA. Thus, our ruling that Wolk's state law claims are preempted by ERISA would constitute reversible error if wrong.

Accordingly, we find that the March 31, 1998 order involves a controlling question of law.

Substantial Ground for Difference of Opinion

Wolk argues that there are substantial grounds for a difference of opinion as to the correctness of the March 31, 1998 order. Wolk points out that neither the Supreme Court nor the Third Circuit has decided the ERISA preemption issue ruled on in the March 31, 1998 order and that there is currently a split of opinion among the Fourth, Eighth, and Ninth Circuits and the First, Fifth, Seventh, and Tenth Circuits. UNUM does not contest Wolk's argument as to this element.

Wolk provides an accurate accounting of the current state of the law on the ERISA preemption issue. Neither the Supreme Court nor the Third Circuit has decided the issue. The Circuit Courts that have spoken, however, follow one of two conflicting views known as the majority and minority views. Although we adopted the minority view, we recognize

that the Third Circuit may find the arguments supporting the majority view more persuasive. See Souza v. Scalone, 563 F.2d 385 (9th Cir. 1977) ("Because at the time of the district court's certification there was a conflict among the circuits on this controlling question of law, we permitted this appeal to be taken pursuant to 28 U.S.C. § 1292(b).")

Accordingly, we find that there are substantial grounds for a difference of opinion as to the correctness of the March 31, 1998 order.

Materially Advance the Ultimate Termination of Litigation

Wolk argues that an immediate interlocutory appeal of the March 31, 1998 order will materially advance the ultimate termination of the litigation. Wolk maintains that a reversal of the March 31, 1998 order by the Third Circuit would require a complete retrial of the case. Thus, an interlocutory appeal would foster judicial economy and conserve judicial resources.

In response, UNUM argues that costs associated with unnecessary litigation, alone, are insufficient to warrant allowing the immediate appeal of a pretrial order. Citing to Zygmuntowicz v. Hospitality Investments, Inc., 828 F. Supp. 346, 353 (E.D. Pa. 1993), UNUM maintains that the Court should consider whether an interlocutory appeal would (1) obviate the need for trial; (2) eliminate complex issues, thereby greatly simplifying the trial; and (3) eliminate issues, thus making discovery much easier and less costly.

The Third Circuit has offered no specific guidance on how the district courts are to evaluate this requirement. Understandably, therefore, the district judges within the Third Circuit have applied varying analyses. It is apparent, however, that the "advance the termination" element is closely tied to the controlling question of law element. See Public Interest Research Group v. Hercules, Inc., 830 F. Supp. 1549, 1547 (D. N.J. 1993) (citing 16 C. Wright, et al., Federal Practice and Procedure § 3930 at 163 (1987)).

> [Q]uestions found to be controlling commonly involve the possibility of avoiding trial proceedings, or at least curtailing and simplifying pretrial or trial. Most of the cases deal with the "advance termination" requirement in terms no more complex than these. If present appeal promises to advance the time for trial or to shorten the time required for trial, appeal is appropriate. Immediate appeal may be found inappropriate if there is a good prospect that the certified question may be mooted by further proceedings, if the character of the trial is not likely to be affected, or if an essentially collateral matter such as attorney fees is involved. The choice to emphasize the "controlling question of law" requirement or to emphasize instead the "materially advance" requirement often seems a matter of chance.

16 C. Wright, ET AL., Federal Practice and Procedure § 3930 at 432 (2d ed. 1996).

Although its holding does not bind this Court, we can appreciate the Zygmuntowicz court's attempt to establish a clearer, more precise test and recognize that the factors set forth therein are relevant to the district court's inquiry. We do not believe, however, that the court's analysis is limited to these three factors.

First, we would agree with UNUM that this case does not involve complex issues of law whether it is pursued under state law or ERISA. We would also agree that the additional discovery needed for an ERISA claim would be minimal, as discovery for the state law claims is essentially complete. Overall, however, the unique facts and circumstances of the present case favor a finding that an appeal would materially advance the ultimate termination of the litigation.

The entire character of the case would be affected if the preemption ruling is held to be erroneous. As previously noted, the standard of review, the damages recoverable, and the relevant factual issues significantly differ as between ERISA and state law claims. More importantly, however, an appeal could prevent unnecessary trial procedures. ERISA does not provide a right to a jury trial. Thus, while an interlocutory appeal may not obviate the need for some type of trial, it may very well eliminate the need for an unnecessary bench trial. The fact that this case is not on the eve of trial, as a trial date has not been set, further supports a decision to avoid this potential. Indeed, the proceedings are essentially back to square one as the March 31, 1998 order eliminated every count of Wolk's complaint.

Furthermore, the ERISA preemption issue is not a collateral matter and will not be mooted by further

proceedings. Also, it is a purely legal issue involving no finding of fact. Finally, we do not believe, based on the history of the case, that there is any potential for meaningful settlement discussions until the preemption issue is decided on appeal.

Accordingly, we find that immediate appeal of the March 31, 1998 order would materially advance the ultimate termination of the litigation.

Wolk's motion to certify order of March 31, 1998 for interlocutory appeal and motion to stay proceedings pending disposition of the appeal (Doc. No. 41) are HEREBY GRANTED.

Pursuant to Fed. R. App. P. 5(a), the Court HEREBY AMENDS its Order of March 31, 1998 to include the following:

> This Court is of the opinion that the Order of March 31, 1998 involves a controlling question of law in this case regarding whether partner-owners who share coverage under a group health insurance policy with employees are subject to ERISA when pursuing claims against the insurer. The Court further finds that there is substantial ground for difference of opinion regarding this issue and that an immediate appeal may materially advance the ultimate termination of this litigation. The Court therefore certifies the Order of March 31, 1998 for interlocutory appeal pursuant to 28 U.S.C. Section 1292(b).

IT IS FURTHER ORDERED that the current proceedings in this Court, including the filing of an amended complaint to state a cause of action under ERISA, are HEREBY STAYED pending the disposition of the interlocutory appeal.

SO ORDERED this 22 day of June, 1998.

/s/_____
ROBERT J. CINDRICH
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Filed April 2, 1998]

No. 96-356

JANICE BOWERS WOLK,
Plaintiff,

v.

UNUM LIFE INSURANCE OF AMERICA,
Defendant,

MEMORANDUM OPINION

CINDRICH, District Judge March 31, 1998

This action arises from a dispute between plaintiff Janice Bowers Wolk ("Wolk") and defendant Unum Life Insurance Company of America ("UNUM") regarding the payment of certain benefits available to Wolk under her disability insurance policy with UNUM. Wolk filed a six count complaint asserting at Count One a claim for breach of contract; at Count Two, bad faith; at Count Three, breach of duty of good faith and fair dealing; at Count Four, declaratory

judgment; at Count Five, specific performance of contractual obligation to deal fairly and in good faith; and at Count Six, specific performance-reinstatement of disability insurance benefits. Pending before the Court are several motions which address below.

I. Background

The underlying facts are not in dispute. Wolk is an attorney an former tax partner with the Pittsburgh law firm of Eckert, Seamans, Cherin & Mellott ("ESCM"). ESCM is a large law firm with several offices. There are 225 lawyers in its Pittsburgh office alone.

Since 1978, employees of ESCM have been provided with group term disability insurance coverage under UNUM policy No. 58927. Initially, this policy provided no coverage to the ESCM partners. On December 21, 1990, however, ESCM entered into "amendment No. 10" to the existing policy, replacing it with an entirely new policy bearing the same number (the "Policy"). The Policy continued the coverage provided to ESCM associates and support staff and also provided coverage to ESCM partners. ESCM maintains that it considered each partner's policy as an individual contract of insurance and that the partners' enrollment in the Policy was to take advantage of discounted group rates and reduce the cost of coverage to individual partners. Wolk's Brief In Opposition To Defendant's Motion For Summary Judgment ("Wolk's Br.") (Doc. No. 27) Ex. A.

Under the terms of the Policy, partners and the executive director were designated as class one employees. Associates and certain other professional employees were

designated class two employees, and all other employees were designated class three employees. Class one employees paid the entire cost of their disability insurance coverage. No contribution was required from class two and three employees.

In May 1990, Wolk was diagnosed with chronic fatigue syndrome ("CFS"). During 1992, Wolk's condition deteriorated to the point where she could no longer function as a corporate tax partner. Wolk's partnership terminated effective March 31, 1993. At that time, Wolk submitted an application for disability benefits. UNUM approved Wolk's application and commenced payment of disability benefits effective April 1, 1993. UNUM paid benefits of $5,850 per month from April 1, 19993 to April 1, 1994, at which time the benefits increased to $6,318 per month pursuant to the Policy's cost of living adjustment.

On March 27, 1995, UNUM notified Wolk that she no longer qualified for disability benefits under the terms of the plan. UNUM advised Wolk of her right to appeal its determination and to submit additional information in support of her claim. On April 13, 1995, Wolk, through counsel, notified UNUM of her intention to appeal the determination.

On November 6, 1995, at UNUM's request and expense, Wolk underwent neuropsychiatric testing by Marian B. Patterson, Ph.D. Dr. Patterson reported that although Wolk's deficits in attention and problem solving were not severe enough to produce serious functional impairment in everyday living, they were likely to interfere with her ability to make the complex decisions required of a tax attorney. UNUM contends that based on this new information, it

notified Wolk on February 27, 1996, that her appeal had been sustained, and that her benefits would be reinstated retroactive to March 27, 1995. Wolk commenced the present suit on February 27, 1996, the same day UNUM notified her of its intention to restore her benefits.

On May 22, 1996, UNUM delivered a check to Wolk in the amount of $59,374.39, representing benefits from March 27, 1995 through May 27, 1996, less offsetting Social Security disability benefits which Wolk was awarded during the pendency of her ERISA appeal. On June 20, 1996, UNUM issued a check in the amount of $3,197.50, representing interest on Wolk's back benefits at the rate of six percent. Wolk is presently receiving all of the monthly benefits to which she is entitled.

II. UNUM's Motion For Summary Judgment

UNUM argues that each count of the complaint is preempted by ERISA. Both UNUM and Wolk are in agreement that the dispositive issue with regard to ERISA preemption in this case is whether partner-owners who share coverage under a common insurance policy with employees are subject to ERISA when pursuing claims against the insurer.

By way of background we note that the parties are in agreement that the Policy is part of an employee welfare benefit plan governed by ERISA. The parties also agree that Wolk's claims are all state law claims subject to ERISA preemption. Where the parties disagree, however, is whether a partner-owner such as Wolk, who shares coverage under a common insurance policy with employees, are subject to

ERISA when pursuing claims against the insurer. On this issue the United States Court of Appeals for the Third Circuit has not had occasion to rule.

Wolk asserts that a majority of the Circuit Courts that have addressed the issue, specifically, the First, Fifth, Seventh and Tenth Circuits, find that partners-owners are employers and therefore, cannot invoke the protections of ERISA. The gist of the majority view is that the definition of "employer" contained in ERISA and the Department of Labor's ("DOL") regulation governing the determination of what qualifies as an ERISA plan, precludes a partner-owner from participating in such a plan. See Fugarino v. Hartford Life and Accident Ins. Co,, 969 F.2d 178 (6th Cir. 1992); Kwatcher v. Massachusetts Service Employees Pension Funds, 879 F.2d 957 (lst Cir. 1989); Peckham v. Board of Trustees Of the International Brotherhood of Painters an Allied Trade Union, 653 F.2d 424 (10th Cir. 1981). The definition of employer provided by ERISA is of little use,[1] thus, the analysis begins with 29 U.S.C. Section 1132(a) (1) (B) of ERISA which governs who is empowered to bring an ERISA action to enforce the payment of benefits. See Kwatcher, 879 F.2d at 959. Section 1132(a) (1) (B) states in relevant part that "[a] civil action may be brought by a participant or beneficiary to recover benefits due him under

---

[1] "The term 'employer' means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity."

29 U.S.C. Section 1002(5).

the terms of his plan, to enforce his rights under the terms of the plan or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. Section 1132(a) (1) (B) .

The next step in the analysis is to determine the definition of "participant." See Kwatcher, 879 F.2d at 959. ERISA's definition of participant can be found at 29 U.S.C. Section 1002(7) which states that:

> The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

Based on this definition, the argument goes, an "employee" and "employer" are "plainly meant to be separate animals; under [ERISA], the twain shall never meet." Kwatcher, 879 F.2d at 959.

As additional support, this line of cases cites to the Department of Labor regulation at 29 C.F.R. Section 2510.3-3(c) (1) which governs the determination of which employee benefit plans qualify as ERISA plans. See Kwatcher, 879 F.2d at 961. Section 2510.3-3 states in relevant part as follows:

> (b) Plans without employees. For purposes of Title I of the Act and this chapter, the term

> "employee benefit plan" shall not include any plan, fund or program, . . . under which no employees are participants covered under the plan. . . .
>
> (c) Employees. For purposes of this section:
>
> (1) An individual and his or her Spouse shall not be deemed to be employees with respect to a trade or business, which is wholly owned by the individual . . .
> (2) A partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership.

The next logical extension is that ERISA prohibits payments to an employer from a qualified plan per the statute's anti-inurement provision at 29 U.S.C. Section 1130(c) (1). See Kwatcher, 879 F.2d at 960. Section 1130(c) (1) states in relevant part:

> **Establishment of trust**
>
> **(c) Assets of plan not to inure to benefit of employer; allowable purpose of holding plan assets**
>
> (1) [T]he assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

The conclusion follows that application of the anti-inurement rule prohibits an employer from being a participant in a qualified plan, thus, an employer lacks standing to recover benefits under ERISA.

A minority of Circuit Courts that have addressed the issue, specifically the Fourth, Eighth, and Ninth Circuits, disagree with the previous analysis and hold that a partner-owner can have standing to sue under ERISA. See Prudential Ins. Co. of Am. v. John Doe, 76 F.3d 206 (8th Cir. 1996); Robinson v. Linomaz, 58 F.3d 365 (8th Cir. 1995); Peterson v. American Life & Health Ins. Co., 48 F.3d 404 (9th Cir. 1995); Madonia v. Blue Cross & Blue Shield of Virginia, 11 F.3d 444 (4th Cir. 1993). Generally, this line of cases applies a similar plain language analysis, noting first that 29 U.S.C. Section 1132(a) (1) states that a civil action may be brought by "a participant **or beneficiary**. . . . " (Emphasis added). Beneficiary is defined in ERISA as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. Section 1002(8). Thus, any person designated to receive benefits from a policy that is part of an ERISA plan may bring a civil suit to enforce ERISA. See Robinson, 58 F.3d at 369.

The minority courts note that 29 C.F.R. Section 2510.3-3, the DOL regulation upon which the majority view places much emphasis, states in its introduction that the definition of employee is for purposes of that regulation only. See Madonia, 11 F.3d at 449. Also, Section 2510.3-3 deals exclusively with the determination of the existence of an employee benefit plan and by its very terms excludes owners and partners from the definition of employee for its limited

self-proclaimed purpose of clarifying when a plan is covered by ERISA. Id. These cases reason, therefore, that once a plan has been established, it would be anomalous to have some insureds pursuing benefit claims under state law while requiring others covered by the identical policy to proceed under ERISA. Peterson 48 F.3d at 409.

In Prudential, the facts of which are very similar to the instant case, the Eighth Circuit addressed ERISA's anti-inurement provision at 29 U.S.C. Section 1103(c)(1). The plan at issue in Prudential was a health insurance policy. The Court stated that

> the 'anti-inurement' provision does not seem directly applicable to the collection of health insurance benefits. The provision states that no asset of the plan may inure to the benefit of the employer. 29 U.S.C. Section 1103(c) (1). The provision appears intended to restrict the use of assets accumulating in trust and pension funds. Section 1103 is headed 'Establishment of trust,' and the exceptions to the anti-inurement rule, listed within section 1103(c) (1) itself, deal with the return of contributions and the distribution of residual assets.
>
> [Also], the legislative history involving the section indicates congressional concern over the wrongful diversion of trust assets and the administrative integrity of benefit plans. Section 1103(c) (1). . . deal[s] with fiduciary duties for plan administrators and employers. Boyle v. Anderson, 68 F.3d 1093, 1102 (8th

> Cir. 1995). Congress included these provisions in order to make the law of trusts applicable to the plans and to eliminate "'such abuses as self-dealing, imprudent investing, and misappropriation of plan funds.'" Id. (quoting Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 15 (1987).
>
> [T]he legislative history made it clear that the legislation imposed strict fiduciary obligations on those having discretion or responsibility for the management or disposition of pension or welfare plan assets. In summarizing the ERISA conference report, Senator Williams stated that "'the objectives of these provisions are to make applicable the law of trusts; to prohibit exculpatory clauses that have often been used in this field; to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breach of trusts. (quoting 120 Cong. Rec. 29932 (1974)). None of these concerns would force the exclusion of a controlling shareholder from the terms of an ERISA group health policy.

Prudential, 76 F.3d at 209.

We think the distinction between pension funds and group health insurance, or in this case group long term disability insurance, is an important one. Indeed, the seminal cases Wolk cites in support of the majority view involved

qualified pension plans. See Kwatcher, 879 F.2d 957 (plaintiff seeking to collect benefits from qualified pension plan); Peckham, 653 F.2d 424 (same). The facts of the present case further illustrate that the concerns of the anti-inurement provision are not invoked with a group disability insurance policy. The Policy was at all times administered by UNUM; ESCM's role was limited solely to the processing of paperwork and the payment of premiums; and all substantive decisions regarding beneficiaries' eligibility or ineligibility for disability benefits were made by UNUM, not ESCM. Wolk's Br. Ex. A. Furthermore, as was alluded to by the court in Prudential, receiving coverage under a policy of insurance underwritten and administered by an insurance company, does not invoke the same concerns as the receipt of trust or pension assets.

Under the facts of this case, we follow the view espoused by the Eighth Circuit in Prudential and find that Wolk's claims are preempted by ERISA. We agree that under a plain reading of the statute, Wolk is a beneficiary under the terms of the Policy and as such must bring suit for any claims relating to the payment of benefits pursuant to the ERISA.[2] We also find that this conclusion does not conflict

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[2] An additional comment is in order. As previously noted, ESCM maintains that it considered each partner's policy as an individual contract of insurance and that the partners' enrolled in the Policy to take advantage of discounted group rates and reduce the cost of coverage to individual partners. Understandably, however, Wolk does not argue that the Policy is not covered by ERISA as such fiction does not comport with 29 C.F.R. Section 2510.3-3. We are in agreement with the courts of the minority view that once an ERISA plan has been established, it would be an

with ERISA's anti-inurement provision. Because Wolk does not assert an ERISA claim in her complaint, she will be given thirty days in which to file an amended complaint.[3]

III. Other Outstanding Motions

The following discovery motions are also pending:

1) Plaintiff's Motion To Compel And For Sanctions (both part of Doc. No. 33)

2) Defendant's Motion For Protective Order (Doc. No. 29)

3) Defendant's Motion For Interim Protective Order (Doc. No. 35)

These motions were triggered by Wolk's contention that UNUM has not responded to certain interrogatories and request for documents. In rebuttal, UNUM maintains that the information Wolk references in her motion to compel was not specifically requested. UNUM further contends that some of

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anomaly to require some insureds to pursue benefit claims under ERISA while allowing others covered by the identical policy to proceed under and seek the broader relief provided by state tort law.

[3] UNUM makes several alternative arguments in support of its motion. We need not address these arguments in light of our ruling that ERISA preempts all of the claims asserted in the complaint.

the information requested contains confidential commercial information prompting its filing of the motions for protective order.

In light of our ruling that ERISA preempts Wolk's current claims and that she may amend her complaint, we will deny these motions without prejudice. If after filing an amended complaint Wolk still deems the requested discovery necessary for her case, she may renew her motion to compel.

An order consistent with this memorandum opinion will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

No. 96-356

JANICE BOWERS WOLK,
Plaintiff,

v.

UNUM LIFE INSURANCE
OF AMERICA,
Defendant.

ORDER

AND NOW, this 31st day of March 1998, for the reasons stated in the accompanying memorandum opinion, **IT IS HEREBY ORDERED** that the defendant's Motion For Summary Judgment (Doc. No. 17) is **GRANTED**. The plaintiff shall have thirty days from the date of this order to file an amended complaint. **IT IS FURTHER ORDERED** that plaintiff's Motion To Compel And For Sanctions (both part of Doc. No. 33); defendant's Motion For Protective Order (Doc. No. 29); and defendant's Motion For Interim Protective Order (Doc. No. 35) are all **DENIED** without prejudice.

/s/
ROBERT J. CINDRICH
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Filed July 29, 1999]

No. 98-3542

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JANICE BOWERS WOLK,
Appellant,

v.

UNUM LIFE INSURANCE OF AMERICA,

(D.C. Civ. No. 96-00356)

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge, and SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, and BRIGHT, Circuit Judges

The petition for rehearing filed by the appellant, Janice Bowers Wolk, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the Court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Bright's vote is limited to voting to deny rehearing before the original panel.

BY THE COURT:

/s/_____
Circuit Judge

DATED: **JULY 29, 1999**

Supreme Court, U.S.
FILED
NOV 23 1999
OFFICE OF THE CLERK

No. 99-701

In The

Supreme Court of the United States

JANICE BOWERS WOLK,

Petitioner,

vs.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court and the Third Circuit Court of Appeals were correct in interpreting the term "beneficiary" as defined in ERISA, 29 U.S.C. § 1002(8), in accordance with its plain meaning, so as to confer standing to sue under 29 U.S.C. § 1132(a)(1) upon a partner who is eligible to receive and does receive benefits under the terms of an employee welfare benefit plan.

2. Whether there exists an irreconcilable split of authority among the Circuit Courts where all Circuit Courts which have construed the term "beneficiary" in the context of the present case are in accord with the Third Circuit's decision.

3. Whether there is any clearly expressed Congressional intention which would require the term "beneficiary" to be construed other than in accordance with its plain meaning, so as to preclude the application of ERISA to a partner who is eligible to receive and does receive benefits under an employee welfare benefit plan subject to ERISA.

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.6 of the Rules of the United States Supreme Court, I certify that the following publicly held company is the owner of ten percent (10%) or more of the stock of the Respondent: UNUMProvident Corporation

TABLE OF CONTENTS

Page

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Background 2

1. The Parties 3

2. The UNUM Policy 4

3. Wolk's Disability Claim 5

B. Procedural History 7

REASONS FOR DENYING THE PETITION 8

A. The Third Circuit's decision is in accordance with the plain language of the statute and every Circuit Court which has had occasion to construe the term "beneficiary." 8

B. Wolk's claim that there is an irreconcilable division of authority among the Circuit Courts of Appeal is erroneous 11

C. There is no reason to disregard the plain language of ERISA 13

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) 15, 16

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) 15

Eichhorn, Eichhorn & Link v. Travelers Insurance Co., 896 F.Supp. 812 (N.D. Ind. 1995) 13

Engelhardt v. Paul Revere Life Insurance Co., 139 F.3d 1346 (11th Cir. 1998) 10

Fugarino v. Hartford Life and Accident Insurance Co., 969 F.2d 178 (6th Cir. 1996), *cert. denied*, 507 U.S. 966 (1993) 11

Giardono v. Jones, 867 F.2d 409 (7th Cir. 1989) 12

Harper v. American Chambers Life Insurance Co., 898 F.2d 1432 (9th Cir. 1990) 10

Harris v. TMG Life Insurance Co., 915 F.Supp. 869 (S.D. Tx. 1996) 12, 13

Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990) 8

Kwatcher v. Mass. Service Employees Pension Fund, 879 F.2d 957 (1st Cir. 1989) 11

Lain v. UNUM Life Insurance Company of America, 27 F.Supp.2d 926 (S.D. Tx. 1998) 13

Madden v. Country Life Insurance Co., 835 F.Supp. 1081 (N.D. Ill. 1993) 12

TABLE OF AUTHORITIES – Continued

Page

Madonia v. Blue Cross and Blue Shield of Virginia, 11 F.3d 444 (4th Cir. 1993), *cert. denied*, 511 U.S. 1019 (1994) 11, 12

Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985) 17

Matinchek v. John Alden Life Insurance Co., 93 F.3d 96 (3d Cir. 1996) 12

Meredith v. Time Insurance Co., 980 F.2d 352 (5th Cir. 1993) 12

Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987) 16

Mohasco Corp. v. Silver, 447 U.S. 807 (1980) 14

Peckham v. Board of Trustees, 653 F.2d 424 (10th Cir. 1981), *modified*, 724 F.2d 100 (10th Cir. 1983) 11

Peterson v. American Life and Health Insurance Co., 48 F.3d 404 (9th Cir. 1995), *cert. denied*, 516 U.S. 942 (1995) 10, 15

Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987) 16, 17

Prudential Insurance Co. v. Doe, 76 F.3d 206 (8th Cir. 1996) 10

Reuben v. United States, 449 U.S. 424 (1981) 8

Robinson v. Linomaz, 58 F.3d 365 (8th Cir. 1995) 10

Salameh v. Provident Life and Accident Insurance Co., 23 F.Supp.2d 704 (S.D. Tx. 1998) 13

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 16

TABLE OF AUTHORITIES – Continued

Page

Spurlock v. Employers Health Insurance Co., 13 F.Supp.2d 884 (E.D. Wis. 1998) 13

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) 8

Vega v. National Life Insurance Services, Inc., 188 F.3d 287 (5th Cir. 1999) 11, 12

Wolk v. UNUM Life Insurance Company of America, 186 F.3d 352 (3d Cir. 1999) ..... *passim*

STATUTES

29 U.S.C. § 1002(7) 1, 11, 13

29 U.S.C. § 1002(8) ..... *passim*

29 U.S.C. § 1132(a)(1) 1, 10

29 U.S.C. § 1132(a)(1)(B) 1

29 U.S.C. § 1144(a) 2, 7, 10, 16

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1002(7):

The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

* * * *

29 U.S.C. § 1002(8):

The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

* * * *

29 U.S.C. § 1132(a)(1):

(a) Persons empowered to bring a civil action.

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

* * * *

29 U.S.C. § 1144(a):

(a) Supersedure; effective date.

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

STATEMENT OF THE CASE

A. Background

The United States Court of Appeals for the Third Circuit in the present case, and every other Circuit Court of Appeals that has had occasion to consider the ERISA definition of "beneficiary" has held that a business owner who chooses to be covered under an employee benefit plan subject to ERISA has standing to sue under ERISA when pursuing claims against the plan. Contrary to Wolk's assertion, there is no irreconcilable conflict among the Circuit Courts with respect to the interpretation of the term "beneficiary" as set forth in 29 U.S.C. § 1002(8).

As the Third Circuit found, the statutory definition is clear and unambiguous. A "beneficiary" is a "person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." Wolk unquestionably satisfies this

definition. Wolk is eligible to receive, has received and continues to receive benefits under the terms of the plan.

Wolk's contention that she will be deprived of an effective remedy for UNUM's alleged bad faith[1] if her state law claims are preempted is specious. Federal preemption is not limited to those circumstances in which the federal remedy is more generous than that provided by state law. If Wolk's state law claims are preempted, she will have the same ERISA remedies available to her as any other plan participant or beneficiary. If Wolk perceives Congress' carefully crafted remedies to be inadequate, her appeal is to the Congress, not the courts.

1. The Parties

Petitioner, Janice Bowers Wolk ("Wolk") is an attorney and former tax partner of the Pittsburgh office of Eckert Seamans Cherin & Mellott ("Eckert Seamans" or the "Firm"). Eckert Seamans was and is one of Pittsburgh's largest law firms, employing some 225 lawyers in the Pittsburgh office alone. Eckert Seamans also maintains offices in Harrisburg, Allentown and Philadelphia, Pennsylvania, as well as Florida, Massachusetts, New York and Washington, D.C., and, according to the complaint filed in the instant case, has an international client base of over 5,000 clients representing virtually every industry.

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[1] Although not an issue in the present appeal, UNUM vehemently denies that it acted in bad faith in its handling of Wolk's claim for disability benefits.

Respondent, UNUM Life Insurance Company of America ("UNUM"), is a corporation with offices and principal place of business located in Portland, Maine. UNUM is in the business of providing, *inter alia*, group disability insurance to employers.

2. The UNUM Policy

Since 1978, employees of Eckert Seamans have been provided with group long-term disability insurance coverage under UNUM Policy No. 58927. Initially, this policy provided no coverage to the firm's partners. (Complaint, ¶18). On December 21, 1990, however, Eckert Seamans entered into Amendment No. 10 to the existing policy, replacing it with an entirely new policy bearing the same number. The new policy had an effective date of September 25, 1990. (Complaint, ¶20). The new policy continued the coverage provided to the Firm's associates and support staff and for the first time also provided coverage to the Firm's partners. (Complaint, ¶21 and Exhibit B thereto).

Under the terms of the new policy, partners and the executive director were designated as Class one employees. Associates and certain other professional employees were designated Class two employees and all other employees were designated Class three employees. (Complaint, Exhibit B, page L-PS-1). Class one employees paid the entire cost of their disability coverage. No contribution was required from Class two and Class three employees. (*Id.*, page L-PS-3).

Contrary to the statement at page 7 of Wolk's petition, there were no individual insurance contracts between the Firm's partners and UNUM. Wolk and other partners of the Firm were covered under the same policy which provided coverage to the Firm's associates and other employees, and which unquestionably was part of an employee welfare benefit plan governed by ERISA.

3. Wolk's Disability Claim

In May 1990, Wolk was diagnosed with chronic fatigue syndrome (CFS). (Complaint, ¶27). During 1992, Wolk's condition deteriorated to the point where she could no longer function as a corporate tax partner. (Complaint, ¶31). Wolk's partnership terminated effective March 31, 1993. (Complaint, ¶32). At that time, Wolk submitted an application for disability benefits. (Complaint, ¶32). UNUM approved Wolk's application and commenced payment of disability benefits effective April 1, 1993.[2] (Complaint, ¶35). UNUM paid benefits of $5,850.00 per month from April 1, 1993 to April 1, 1994, at which time the benefits increased to $6,318.00 per month pursuant to the policy's cost of living adjustment. (Complaint, ¶35).

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[2] Although the UNUM policy included an "elimination period" of 360 days with respect to Class one employees, during which no benefits were payable, UNUM took into consideration that plaintiff had not performed significant duties during the previous year, even though she had continued to receive her full salary. As a result, Wolk suffered no break in income despite the existence of the 360 day elimination period.

On March 27, 1995, UNUM notified Wolk that she no longer qualified for disability benefits under the terms of the Plan. (Complaint, ¶38 and Exhibit D thereto). UNUM advised Wolk of her right to appeal its determination and to submit additional information in support of continued disability. (Complaint, ¶38 and Exhibit D thereto). On April 13, 1995, Wolk, through counsel, notified UNUM of her intention to appeal the denial of further disability benefits. (Complaint, ¶42 and Exhibit F thereto).

On November 6, 1995, at UNUM's request and expense, Wolk underwent neuropsychiatric testing by Marian B. Patterson, Ph.D. Dr. Patterson reported that, although Wolk's deficits in attention and problem solving (presumably attributable to CFS) were not severe enough to produce serious functional impairment in everyday living, they were likely to interfere with her ability to make the complex decisions required of a tax attorney. (Complaint, ¶¶50-51).

Based on this new information, UNUM, on February 27, 1996, notified Wolk that her appeal had been sustained, and that her benefits would be reinstated retroactive to March 27, 1995. (Answer to Complaint, Exhibit A). Wolk commenced the present lawsuit on February 27, 1996, the same day that UNUM notified her of its intention to restore her benefits. UNUM thereafter re-instituted benefit payments and paid all back benefits which were due, with interest. Wolk is currently receiving all benefits to which she is entitled under the terms of the plan. *See* Third Circuit Opinion, 186 F.3d 352, 354 n. 4.

B. Procedural History

Wolk's February 27, 1996 complaint consisted entirely of state law claims for breach of contract, bad faith, "breach of duty of good faith and fair dealing," declaratory judgment, "specific performance of contractual obligation to deal fairly and in good faith," and "specific performance – reinstatement of disability benefits." Following written discovery, both parties filed motions for summary judgment.[3]

In its December 6, 1996, summary judgment motion, UNUM argued that ERISA, 29 U.S.C. § 1144(a), preempted state law claims by partners who claimed eligibility for benefits under an employee welfare benefit plan governed by ERISA. In response, Wolk conceded that the UNUM policy was part of an employee welfare benefit plan, and that ERISA preempted state law claims on behalf of the Firm's employees, but argued that ERISA was inapplicable to her because she was an "employer" rather than an "employee."

On March 31, 1998, the District Court granted UNUM's motion for summary judgment. The District Court found that under a plain reading of the statute, Wolk was a beneficiary and must therefore bring suit under ERISA. Wolk sought and was granted leave to file

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[3] Wolk's motion for summary judgment sought attorney's fees and other unspecified damages on her breach of contract claim. The district court, by order dated September 30, 1997, denied Wolk's motion. This matter is not part of the present appeal.

an interlocutory appeal to the Third Circuit Court of Appeals.

In an opinion and order dated June 30, 1999, published at 186 F.2d 352, the Third Circuit affirmed the judgment of the District Court. The Third Circuit panel unanimously concluded that, inasmuch as Wolk was a person designated by the terms of an employee benefit plan as one who is entitled to a benefit thereunder, she fit squarely within the ERISA definition of "beneficiary," set forth in 29 U.S.C. § 1002(8). The Third Circuit found it significant that all of the Courts of Appeal that had analyzed the term "beneficiary" in a similar context had adopted the "plain language" interpretation of the District Court.

The Third Circuit denied Wolk's petition for rehearing or rehearing *en banc* by order dated July 29, 1999. The present petition for certiorari followed.

REASONS FOR DENYING THE PETITION

A. The Third Circuit's decision is in accordance with the plain language of the statute and every Circuit Court which has had occasion to construe the term "beneficiary."

The starting point in statutory interpretation is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990). *See also Reuben v. United States*, 449 U.S. 424, 430 (1981); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235

(1989). The Third Circuit's analysis faithfully adhered to this guiding principle:

> "Under ERISA, '[a] civil action may be brought – (1) by a participant or beneficiary – (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.' 29 U.S.C. § 1132(a)(1)(B). ERISA defines the term 'participant' as 'any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan.' 29 U.S.C. § 1002(7). A 'beneficiary' is a 'person designated by a participant, or *by the terms of an employee benefit plan*, who is or may become entitled to a benefit thereunder.' 29 U.S.C. § 1002(8) (emphasis added).
>
> To reiterate, it is undisputed that the 1990 Policy qualifies as an employee benefit plan under ERISA. It also is undisputed that partners of Eckert Seamans are designated to receive benefits under the 1990 Policy – indeed, Wolk applied for, and is currently receiving, benefits from UNUM pursuant to the 1990 Policy. Applying the plain language of the statute to these facts, Wolk fits squarely within the second category of ERISA's definition of a plan 'beneficiary.' Thus, we conclude that Wolk is a "beneficiary" under the 1990 Policy."

186 F.3d at 355-56.

The Third Circuit observed that its plain language interpretation had the support of all of the Courts of Appeal that had analyzed the term "beneficiary" in a

similar context. 186 F.3d at 356, *citing, Engelhardt v. Paul Revere Life Insurance Co.*, 139 F.3d 1346, 1351 (11th Cir. 1998) (physician's claim for benefits under policy covering firm's employees confirmed his status as a plan beneficiary); *Prudential Insurance Co. v. Doe*, 76 F.3d 206, 208 (8th Cir. 1996) (managing attorney and controlling shareholder of professional corporation and his daughter were beneficiaries of health insurance plan); *Peterson v. American Life and Health Insurance Co.*, 48 F.3d 404 (9th Cir. 1995), *cert. denied*, 516 U.S. 942 (1995) (partner was beneficiary under ERISA plan covering two partners and one employee); *Harper v. American Chambers Life Insurance Co.*, 898 F.2d 1432, 1434 (9th Cir. 1990) (partner had standing to sue as beneficiary of an ERISA plan). *See also Robinson v. Linomaz*, 58 F.3d 365 (8th Cir. 1995) (sole shareholders were beneficiaries of health insurance plan covering one common law employee).

The reasoning of the Third Circuit and other Circuit Courts is unassailable. Congress chose to include in the ERISA definition of "beneficiary" persons who, for whatever reason, have been designated by the terms of an employee benefit plan as entitled to a benefit thereunder. 29 U.S.C. § 1002(8). Wolk, unquestionably, has been so designated. Wolk was eligible to receive benefits under a policy insuring employees of Eckert Seamans. Wolk has received and is receiving benefits. There can be no doubt that Wolk is a "beneficiary" with standing to sue under 29 U.S.C. § 1132(a)(1).

ERISA preempts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . . " 29 U.S.C. § 1144(a). Wolk's state law claims are

preempted. Any other conclusion would be contrary to the plain language of the statute.

B. Wolk's claim that there is an irreconcilable division of authority among the Circuit Courts of Appeal is erroneous.

Wolk cites the recent decision of the Fifth Circuit in *Vega v. National Life Insurance Services, Inc.*, 188 F.3d 287 (5th Cir. 1999), as acknowledging the existence of a conflict among the Circuit Courts with respect to the interpretation of the term "participant" as defined in 29 U.S.C. § 1002(7). Although several Courts of Appeal have held that an "employer" cannot be an "employee" and hence a "participant" in an ERISA plan. *Fugarino v. Hartford Life and Accident Insurance Co.*, 969 F.2d 178 (6th Cir. 1996), *cert. denied*, 507 U.S. 966 (1993); *Peckham v. Board of Trustees*, 653 F.2d 424 (10th Cir. 1981), *modified*, 724 F.2d 100 (10th Cir. 1983); *Kwatcher v. Mass. Service Employees Pension Fund*, 879 F.2d 957 (1st Cir. 1989), the Third Circuit was quick to recognize that none of these decisions included an in-depth analysis of the term "beneficiary," nor did they address the same factual situation at issue here. *Wolk, supra*, 186 F.3d at 356 n. 5.

The *Kwatcher* line of cases holds that "employer" and "employee" were intended to be "separate animals," *Kwatcher, supra*, 879 F.2d at 959, such that a business owner can never be considered to be a "participant" in an employee benefit plan serving employees of the business. The Fifth Circuit in *Vega* and the Fourth Circuit in *Madonia v. Blue Cross and Blue Shield of Virginia*, 11 F.3d 444 (4th Cir. 1993), *cert. denied*, 511 U.S. 1019 (1994), two of

the very cases on which Wolk relies, specifically rejected this interpretation.

The *Madonia* and *Vega* courts recognized that a sole shareholder may also be an employee of the business he or she owns, and, hence, a "participant" in its employee benefit plans. Although the *Madonia* and *Vega* courts had no occasion to consider the ERISA definition of "beneficiary," they reject Wolk's basic premise that standing to sue under ERISA somehow hinges on the distinction between "employer" and "employee."

The Seventh Circuit decision on which Wolk relies, *Giardono v. Jones*, 867 F.2d 409 (7th Cir. 1989), is likewise distinguishable. *Giardono* merely holds that a plan which benefits only the owners of a business and does not include any of its employees is not subject to ERISA at all. The *Giardono* court likewise had no occasion to consider whether a business owner can be a "participant" in or "beneficiary" of a plan subject to ERISA. *See also Meredith v. Time Insurance Co.*, 980 F.2d 352 (5th Cir. 1993); *Matinchek v. John Alden Life Insurance Co.*, 93 F.3d 96 (3d Cir. 1996).

Given the complete absence of appellate support for her position, Wolk understandably places great reliance on the District Court's decision in *Madden v. Country Life Insurance Co.*, 835 F.Supp. 1081, 1087 (N.D. Ill. 1993). The *Madden* court inexplicably reasoned that a partner cannot be a "beneficiary" in an employee benefit plan because Congress could not have intended that an employer could designate himself as his employee's chosen beneficiary. *See also Harris v. TMG Life Insurance Co.*, 915 F.Supp. 869, 872 (S.D. Tx. 1996). The *Madden* court's reasoning has not

been adopted in any appellate decision, and has not even gained the acceptance of district courts within the Seventh Circuit. *Cf. Eichhorn, Eichhorn & Link v. Travelers Insurance Co.*, 896 F.Supp. 812 (N.D. Ind. 1995); *Spurlock v. Employers Health Insurance Co.*, 13 F.Supp.2d 884 (E.D. Wis. 1998). The same is true of *Harris*, which has been rejected in at least two district court decisions in the same district in which it was decided. *Salameh v. Provident Life and Accident Insurance Co.*, 23 F.Supp.2d 704 (S.D. Tx. 1998); *Lain v. UNUM Life Insurance Company of America*, 27 F.Supp.2d 926 (S.D. Tx. 1998).

Far from evidencing an irreconcilable division of authority, the Circuit Courts which have had occasion to construe the term "beneficiary" have unanimously concluded that the statute means what it says. Not only is there no *irreconcilable* conflict in the interpretation of the statutory definition, there is no conflict at all.

C. There is no reason to disregard the plain language of ERISA.

Wolk's final argument is essentially that Congress did not mean what it said when it defined the term "beneficiary" under ERISA. Wolk first contends that the Third Circuit's plain language interpretation of the term "beneficiary" renders the term "participant," as defined in 29 U.S.C. § 1002(7), moot. As this case dramatically illustrates, however, one can be a "beneficiary" without being a "participant," just as one can be a "participant" without being a "beneficiary," such as in the case of employee group life insurance. The fact that a particular individual may have standing to sue as a participant and

as a beneficiary is not a reason to disregard the plain language of either definition.

Wolk next contends that a "logical reading" of ERISA results in the limitation of the term "beneficiary" to the person designated by the participant or, in the event the participant fails to make a designation, by default under the terms of an employee benefit plan. The simple answer is that if Congress had intended the term "beneficiary" to be so limited, it would not have defined it as it did. As the Third Circuit said:

> "We fail to see how Wolk's interpretation is the 'only logical reconciliation' of ERISA's use of the term 'beneficiary.' At most, it is just another way that ERISA's definition of a plan 'beneficiary' might be satisfied – since persons designated by operation of law are, by definition, 'designated by the terms of the plan.' The fact that 'beneficiary' is used in other provisions of ERISA to refer to the beneficiaries of a participant does not necessarily mean that the term was only intended to refer to such persons. In defining the term, Congress was careful to include a category for those designated by the terms of an ERISA plan. *See* 29 U.S.C. § 1002(8). Were we to limit the second category to those designated by operation of law, we would be overstepping our bounds as a court of law. *See Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) (stating that courts must 'respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction.') If Congress did not intend the phrase 'by the terms of an employee benefit plan' to mean

> what it says, it is for Congress alone to correct. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ('We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.')"

Wolk, 186 F.3d at 357.

Likewise, Wolk's contention that her interpretation "promotes uniformity of ERISA decisions by creating only two categories of ERISA jurisdiction," petition, page 24, is a non-sequitur. Apart from producing the result she desires, it is difficult to fathom the benefit to be achieved by the interpretation she promotes. To the contrary, as the Third Circuit observed, Wolk's interpretation creates the anomaly of requiring some insureds to pursue claims under ERISA, while requiring others covered under the identical plan to pursue claims under state law. "Such a scenario would frustrate Congress' intent of achieving uniformity in the law governing employment benefits." *Wolk, supra*, 186 F.3d at 357, *quoting, Peterson, supra*, 48 F.3d at 409. As the Third Circuit went on to observe, "we believe this rationale provides a logical explanation for why Congress chose to include persons designated 'by the terms of an employee benefit plan' in the definition of 'beneficiary.' " *Id.*

The above reasoning also disposes of Wolk's claim that Congress could not have intended to deprive employers, such as herself, from traditional state law remedies. While it is certainly true that federal preemption of state law is not to be taken lightly, this court has time and again commented upon the broad scope of ERISA preemption. *E.g., Alessi v. Raybestos-Manhattan,*

Inc., 451 U.S. 504 (1981); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987); *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987).

ERISA expressly preempts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . . " 29 U.S.C. § 1144(a). This Court has repeatedly observed that "the express preemption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.' " *Pilot Life, supra*, 481 U.S. at 45-46, *quoting, Alessi, supra*, 451 U.S. at 523. As the *Pilot Life* court observed:

> "Congress' specific reference to § 301 of the LMRA to describe the civil enforcement scheme of ERISA makes clear its intention that all suits brought by beneficiaries or participants asserting improper processing of claims under ERISA-regulated plans be treated as federal questions governed by § 502(a) . . .
>
> The expectations that a federal common law of rights and obligations under ERISA regulated plans would develop . . . would make little sense if the remedies available to ERISA participants and beneficiaries under § 502(a) could be supplemented or supplanted by varying state laws."

481 U.S. at 56.

The starting and ending point in the analysis is not, as Wolk would have it, whether she is an "employer" or

an "employee." Congress' interest in promoting uniformity and predictability in its civil enforcement mechanisms prompted it to confer standing to sue on "participants" or "beneficiaries" and further to define "beneficiary" to include persons, such as Wolk, who are entitled to benefit from an employee benefit plan.

Wolk's contention that she will be denied an "effective remedy" if forced to proceed under ERISA, as other employees of the Firm would be required to proceed, has also been addressed by this Court on multiple occasions. *E.g., Pilot Life, supra; Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). As the *Pilot Life* court succinctly stated:

> "In sum, the detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formulation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the Federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA."

481 U.S. at 54.

In short, if Wolk is dissatisfied with the remedies available to her under ERISA, her appeal is to Congress, not the courts.

CONCLUSION

For the reasons set forth herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

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REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. The Third Circuit in this case held that a partner/employer who obtained an individual disability insurance policy related to a group policy that covers employees must pursue remedies for wrongful denial of policy benefits under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., and not under state law. The Third Circuit reasoned that ERISA applied because the partner/employer is a "beneficiary," as defined in 29 U.S.C. § 1002(8), of an "employee welfare benefit plan," as defined in 29 U.S.C. § 1002(1), maintained for "participants and their beneficiaries," as set forth in 29 U.S.C. § 1002(1). There is an irreconcilable conflict in the circuit courts on this issue: Six Circuits (the First, Fourth, Fifth, Sixth, Seventh and Tenth Circuits) have held that employers wrongfully deprived of employment benefits are not subject to ERISA and therefore must proceed under state law, and four Circuits (the Third, Eight, Ninth and Eleventh Circuits) have reached a contrary conclusion. The question presented is whether an employer wrongfully deprived of self-acquired employment benefits is subject to ERISA, 29 U.S.C. § 1132(a), and is therefore precluded from seeking traditional state law remedies.

2. Whether application of ERISA, 29 U.S.C. § 1001 et seq., to redress injuries suffered by an employer wrongfully deprived of self-acquired employment benefits preempts traditional state law remedies in contravention of constitutional principles of federalism because ERISA does not unambiguously require such a preemption and because such a preemption conflicts with the legislative purpose of ERISA as expressed in 29 U.S.C. § 1001.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

I. UNUM Sidesteps the Fundamental Issue of ERISA's Applicability to this Litigation by Asserting that Mrs. Wolk has Conceded that the Policy is an "employee welfare benefit plan." 1

II. UNUM previously Posited that there is a Conflict among the United States Courts of Appeals on the Issue of whether an Employer is Subject to ERISA 2

CONCLUSION 3

TABLE OF AUTHORITIES

STATUTES

29 U.S.C. § 1001 . . . . . i, 1

29 U.S.C. § 1002(1) . . . . . i, 1

29 U.S.C. § 1002(7) 1

29 U.S.C. § 1002(8) i

29 U.S.C. § 1132(a) . . . . . i, 1

I. UNUM Sidesteps the Fundamental Issue of ERISA's Applicability to this Litigation by Asserting that Mrs. Wolk has Conceded that the Policy is an "employee welfare benefit plan."

By asserting that Mrs. Wolk is covered by an "employee welfare benefit plan," UNUM necessarily avers that Mrs. Wolk is either an ERISA "participant" or "beneficiary." An "employee welfare benefit plan" is a "plan, fund, or program ... established or []maintained for the purpose of providing for its participants or their beneficiaries" certain benefits. 29 U.S.C. § 1002(1) (emphasis added). UNUM and the Courts of Appeal upon which it relies have conceded that an employer such as Mrs. Wolk is not an ERISA "participant." 29 U.S.C. § 1002(7) ("'participant' means any employee or former employee of any employer"). Moreover, UNUM has never asserted that Mrs. Wolk is the beneficiary of a "participant." UNUM cannot reconcile the statutory conflict that arises if Mrs. Wolk allegedly is covered by an "employee welfare benefit plan" even though she is neither a participant in such a plan nor a beneficiary designated by a participant in such a plan. ERISA therefore does not apply to this litigation because federal preemption of state law cannot rest upon tautological statutory construction.

Furthermore, contrary to UNUM's contention in its Brief in Opposition to Petition for Writ of Certiorari ("Brief in Opposition"), Mrs. Wolk has never conceded that the Policy is an ERISA employee welfare benefit plan as it pertains to her. In response to UNUM's motion for summary judgment, Mrs. Wolk averred that "the Plan is not an ERISA [employee welfare benefit] Plan with respect to Janice Wolk, as one of the Firm's partners." (Brief in Opposition to

Defendant's Motion for Summary Judgment, at 7). Mrs. Wolk reiterated in her appellate brief to the Third Circuit that the group long-term disability insurance policy that Eckert Seamans purchased was an ERISA employee welfare benefit plan as it related to the employees of the Firm. (Brief of Appellant to the United States Court of Appeals for the Third Circuit, at 15). Mrs. Wolk disputed, however, that the Policy was an ERISA employee welfare benefit plan as it pertained to the Firm's partners. Throughout this litigation, Mrs. Wolk has maintained that UNUM's positions ignore ERISA's careful distinctions between employer and employee and thus broaden the scope of federal jurisdiction, giving rise to important questions of federal preemption that only this Court can adjudicate.

II. UNUM previously Posited that there is a Conflict among the United States Courts of Appeals on the Issue of whether an Employer is Subject to ERISA.

UNUM now claims in its Brief in Opposition to this Court that the United States Court of Appeals are in accord and have held uniformly that employers are subject to ERISA. (Brief in Opposition, at 13). In its brief to the Third Circuit, however, UNUM submitted that the First, Sixth and Tenth Circuits support Mrs. Wolk's position that an employer deprived of self-acquired employment benefits is not subject to ERISA. (Brief of Appellee, at 10).

CONCLUSION

For these reasons, the Petition for Writ of Certiorari of Janice Bowers Wolk should be granted, the Third Circuit Opinion dated June 30, 1998 should be vacated, and the judgment of the United States District Court for the Western District of Pennsylvania dated March 31, 1998 should be reversed.

Respectfully submitted:

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